Supreme Court
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED *

1. In light of the Court's grant of certiorari in *United Paperworkers Int'l Union v. Misco, Inc.*, ___ U.S. ___, 107 S. Ct. 871 (January 12, 1987) (No. 86-651), should the Court also determine whether the clear public policy in protecting the safety of the Nation's airways permits a reviewing court to overturn an arbitrator's decision ordering an airline to reinstate a pilot who had been discharged for flying a passenger jet while he was intoxicated?

2. Does the Federal Aviation Act's mandate to air carriers to "maintain the highest degree of safety" deprive a Railway Labor Act arbitrator of authority to overrule the carrier's policy requiring dismissal as the proper penalty for any pilot who flies a passenger jet while intoxicated?

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* Pursuant to Supreme Court Rule 28.1, Northwest Airlines, Inc., states that Northwest Airlines, Inc., is a wholly-owned subsidiary of NWA, Inc., which is a publicly-held company. Northwest Airlines, Inc., has no subsidiaries that are not wholly-owned. One wholly-owned subsidiary of Northwest Airlines, Inc., Compass 315 Limited, holds twenty-five percent of the shares of Gatwick Handling Limited.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Northwest Airlines, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Northwest Airlines, Inc. v. Air Line Pilots Association, International,* No. 85-6228, entered on January 6, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A) is reported at 808 F.2d 76. The opinion of the District Court for the District of Columbia (App. B) is reported at 633 F. Supp. 779. The arbitration award (App. C) is unreported.

JURISDICTION

The court of appeals entered its judgment (App. D) on January 6, 1987. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1). On February 20, 1987, the Chief Justice entered an order recalling and staying the mandate of the court of appeals (No. A-595).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Railway Labor Act, 45 U.S.C. § 153 and § 184, and the Federal Aviation Act, 49 U.S.C. § 1302(a)(1), § 1302(a)(2), § 1421(a), and § 1421(b). The case also involves a provision of the Federal Aviation Regulations, 14 C.F.R. § 91.11. Those provisions are set out in Appendix E.

STATEMENT

1. Discharge Of Pilot Morrison For Flying A Passenger Jet While Intoxicated

On August 1, 1982, at about 8:00 a.m., Northwest Flight 81, a Boeing 727 jet, left Las Vegas bound for San Francisco. It was carrying 73 passengers and 6 crewmembers. Larry W. Morrison was serving as First Officer—the co-pilot of the flight. At the time, Morrison was intoxicated. In the approximately 30 hours before Flight 81 took off, Morrison had consumed at least a litre of wine, two "double" vodkas, two pints of vodka "chug-a-lugged" from the bottle, and some beer. Morrison had his last drink less than four hours before he entered the cockpit of Flight 81.

Northwest discovered Morrison's intoxication only because his conduct on the morning of the flight aroused the suspicions of other Northwest personnel. Northwest's Flight Operations Manager, after unsuccessfully attempting to stop the departure of Flight 81, ordered Morrison removed from the flight in San Francisco and given a blood test. The test, administered over two and one-half hours after Flight 81 left Las Vegas, showed Morrison's blood alcohol level to be 0.13%. In California, as in most states, a blood alcohol level of 0.10% establishes a presumption of legal intoxication. Current Federal Aviation Administration regulations prohibit flight crewmembers from flying with blood alcohol levels greater than 0.04%. 14 C.F.R. § 91.11(a)(4).

Morrison's conduct on August 1, 1982, was a violation of the FAA's rules prohibiting flight crewmembers from flying "within 8 hours after the consumption of any alcoholic beverage," "while under the influence of alcohol," or while subject to "a known medical deficiency." 14 C.F.R. §§ 91.11, 61.53. Morrison also violated Northwest's rule prohibiting crewmembers from consuming alcoholic beverages "during the 24-hour period immediately preceding departure time on any flight to which assigned." (*See* App. C at 50a). Northwest's regulations have been in effect for over twenty years and provide that violation of the 24-hour rule "shall constitute sufficient cause for discharge." (*Id.*)

On August 6, 1982, following an investigation and a hearing in accordance with the collective bargaining agreement between Northwest and the union representing its pilots, respondent Air Line Pilots Association ("ALPA"), Northwest discharged Morrison, effective as of the date of his misconduct. Northwest's written notice to Morrison explained that he was being discharged because he had violated Northwest's 24-hour rule and had jeopardized the safety of a flight by serving as a cockpit crewmember while under the influence of alcohol.

2. Arbitrator's Reinstatement Award

Morrison, through ALPA, filed a grievance contending that Northwest did not have "just cause" to discharge him. For the first time, Morrison claimed to be an alcoholic and argued that his misconduct should be excused because of his alcoholism. (Prior to being caught flying while intoxicated, Morrison had never even hinted that he might have an alcohol problem.) Northwest's policy is to permit alcoholic pilots to resume flight duty if they seek treatment *before* they endanger safety by breaking the drinking rules and if they are fully rehabilitated, but it will not retain or reinstate a pilot, alcoholic or not, who violates drinking rules. *See* 633 F. Supp. at 785 (App. B at 24a-25a). Accordingly, Northwest rejected the "alcoholism defense" and denied the grievance.

Morrison then appealed his discharge to the statutorily mandated arbitration board, the System Board of Adjustment.[1] Under the collective bargaining agreement, the System Board had jurisdiction over "disputes which may arise under the terms of the Pilots' Agreement," including disputes "growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement." 633 F. Supp. at 788 (App. B at 30a).

Before the System Board, ALPA stipulated to the facts on which Northwest had relied in discharging Morrison: that Morrison had served as co-pilot on Flight 81 while intoxicated and in violation of the 24-hour drinking rule. (App. C at 54a). ALPA argued, however, that Morrison's discharge was without just cause because his admitted misconduct was "the unavoidable consequence

[1] As an air carrier, Northwest's labor relations are governed by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, 181 *et seq.* That Act requires air carriers and their employees to establish "a board of adjustment" to resolve "disputes . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. § 184.

of his [undisclosed] alcoholism." (App. C at 65a). Over Northwest's jurisdictional objections, the System Board considered evidence of Morrison's post-discharge diagnosis and treatment for alcoholism, as well as evidence about the nature of alcoholism. Northwest argued that "as a matter of public policy and based on the obligation of a common carrier to promote safety to the highest possible degree, this Board has no jurisdiction to overturn the discharge." (System Board Record, Northwest Mem. at 6.)

In October 1984, the System Board, by a 2-1 vote, ordered Northwest to reinstate Morrison as soon as he received from the FAA an unconditional medical certificate. The Board found "that Morrison violated the 24-hour rule on August 1, 1982 and also participated in a flight with sufficient alcohol in his bloodstream to raise a presumption of intoxication" (App. C at 65a). It concluded, however, that Morrison should be returned to the cockpit because (1) Morrison is an alcoholic and, therefore, his "offenses . . . were the unavoidable consequence of the illness of alcoholism" (App. C at 72a) and (2) Morrison's alcoholism had been "arrested and successfully treated" *after* his discharge (*id.*).

3. The District Court Decision Voiding The Award

Pursuant to the Railway Labor Act, 45 U.S.C. § 153 First (q) and 28 U.S.C. §§ 1331 and 1337, Northwest sought review of the arbitration award in the United States District Court for the District of Columbia. ALPA counterclaimed for enforcement of the award.

In November 1985, the district court (Judge Joyce Hens Green) held that the award could not be enforced. At the heart of the dispute, the court found, were Northwest's interlocking alcohol-abuse policies, including the rule calling for discharge of any pilot who drinks alcohol within 24 hours of a flight and the standards governing the

rehabilitation and return to flight duty of alcoholic pilots who seek help before they actually endanger public safety. The district court found Northwest to have a "reasonable, rational policy on alcohol use" that is "clearly set out in the Northwest Airline Manual . . . ." 633 F. Supp. at 793 (App. B at 40a). The court also recognized that Northwest had implemented its policy in furtherance of its explicit statutory responsibility under the Federal Aviation Act, 49 U.S.C. § 1421(b), to maintain the "highest possible degree of safety," 633 F. Supp. at 790 (App. B at 35a), and "to evaluate the competency of its pilots and detect defects in training and 'personal characteristics that could adversely affect safety' " *id.*, *quoting* 14 C.F.R. § 121.413(a)(4)(ii).

The court held that the System Board's award exceeded the arbitration board's jurisdiction to interpret and apply the collective bargaining agreement. Noting that the "subject of the grievance is a matter about which the collective bargaining agreement is silent," *id.* at 792 (App. B at 38a), the court found that the System Board's order "challenges the Company's own rules on alcohol use"—"a rule whose meaning was not in dispute and which was not included in the collective bargaining agreement." *Id.* The court ruled that the Board thus went beyond its proper jurisdiction—which in this case was limited to "an examination of the facts forming the basis for the dismissal." *Id.* The Board exceeded its jurisdiction by denying Northwest's "right to enforce its own carefully articulated alcohol use rules respecting 24-hour violators, rules made well known to those in its employ." *Id.*

The court concluded that neither the Railway Labor Act nor the collective bargaining agreement assigned the arbitration board any "authority to rewrite Northwest's safety rules, or to set new policy." *Id.* at 794 (App. B at 41a). To the contrary, the policies and requirements of the Aviation Act, as well as the interests of the public,

weighed against permitting the Board to exercise such authority. *Id.* at 795 (App. B at 42a-43a).

The district court also held that, even apart from the fatal jurisdictional defect in the System Board award, the award itself violated well-defined and dominant public policy against combining "the use of alcohol and flying." *Id.* (App. B at 43a). Since a "pilot or co-pilot may have but seconds to make a decision or execute a maneuver that will determine the fate of hundreds of passengers," the "reinstatement order interferes with the Company's safety obligations" and is thus contrary to public policy. *Id.*

4. The Court Of Appeals Decision Ordering Reinstatement

The court of appeals reversed. In an opinion by Judge Harry Edwards, the court rejected the district court's holding that the Federal Aviation Act limits the authority of grievance arbitrators to supersede passenger safety policies instituted by air carriers pursuant to their federal statutory obligations. 808 F.2d at 82 (App. A at 10a). The court also held that, under its interpretation of the "public policy exception" articulated by this Court in *W. R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers,* 461 U.S. 757 (1983), a court must enforce an arbitration award unless the award "contravene[s] established law" or "require[s] an unlawful act." 808 F.2d at 84 (App. A at 14a). The court ordered Northwest to reinstate Morrison as a pilot and refused to stay its order pending the filing of a petition for a writ of certiorari.

On February 20, 1987, the Chief Justice granted Northwest's application to recall and stay that mandate (No. A-595).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND SET THIS CASE FOR ARGUMENT IN TANDEM WITH *UNITED PAPERWORKERS INT'L UNION V. MISCO, INC.* (NO. 86-651).

In *W. R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers,* 461 U.S. 757 (1983), this Court held that federal courts may decline to enforce labor arbitration awards if the awards are contrary to "public policy." In the decision below, the court of appeals now has interpreted *W. R. Grace* as meaning that arbitral awards can contravene "public policy" *only* when the award itself violates positive law or compels unlawful conduct.

On January 12, 1987, the Court granted certiorari to review *Misco, Inc. v. United Paperworkers Int'l Union,* 768 F.2d 739 (5th Cir. 1985), *cert. granted,* ___ U.S. ___, 107 S. Ct. 871 (No. 86-651). The present case raises an issue that is virtually identical to the follwoing question presented in *Misco:*

> "Whether a federal court may refuse to enforce an arbitration award under a collective bargaining agreement on the ground that enforcement of the award would contravene 'public policy,' where the award neither construes the agreement in a manner that would make the agreement unlawful nor directs the employer to take any action that is prohibited by law." (*Misco* Pet. for Cert. at *i.*).

As the petition in *Misco* explained, there is a clear conflict among the circuits regarding the scope of this Court's decision in *W. R. Grace* that courts may overturn arbitral awards when they are contrary to "public policy."

Compare the present case and *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1, 8 (D.C. Cir. 1986), adopting a narrow view of the "public policy" doctrine, *with* the Fifth Circuit's decision in *Misco* and *with United States Postal Service v. American Postal Workers Union,* 736 F.2d 822 (1st Cir. 1984); and *E. I. DuPont de Nemours v. Grasselli Employees Ass'n,* 790 F.2d 611 (7th Cir. 1986) (dicta), *cert. denied,* ___ U.S. ___, 107 S. Ct. 186 (1986), adopting a more expansive view.

This case deserves plenary consideration along with *Misco.* Although both cases involve safety issues, this case, unlike *Misco,* presents the "public policy" issue on an undisputed factual record showing a clear threat to *public* safety.

In *Misco,* the Fifth Circuit affirmed a district court judgment refusing to enforce an arbitration award. The company had discharged an employee for violating a work rule that prohibited using illegal drugs while on duty or bringing illegal drugs onto company premises. The discharged employee, the operator of a paper "slitter rewinder," had been arrested by the police while on the company's premises in a car filled with marijuana smoke and in which the police had found a small amount of marijuana. The arbitrator found that "the [c]ompany has not proven by any level of evidence that the Grievant was in violation of the [company] Rule." *Misco,* Pet. for Cert. at 51a.

On review, the court of appeals acknowledged the arbitrator's finding, but—based on evidence the arbitrator had refused to consider—made its own finding that the employee in fact had violated the company's work rule. 768 F.2d at 742. Relying on this Court's decision in *W.R. Grace,* the Fifth Circuit held that enforcement of the award would be contrary to the "serious and well-founded public policy" that prohibits "the operation of dangerous

machinery by persons under the influence of drugs or alcohol," even though the employee was not operating any machinery at the time of his arrest. *Id.* at 743.

By contrast, the "public policy" issue is far more starkly presented in this case on a record that suffers from no evidentiary disputes and involves undeniable danger to public safety. Morrison and ALPA have conceded that Morrison acted as co-pilot on a Northwest passenger jet while he was intoxicated.

Nor, in contrast to *Misco*, is this case clouded with doubts about the source and existence of the asserted public policy. As we explain at greater length below, there can be no dispute that federal and state statutes, administrative regulations, and court decisions articulate a "well-defined and dominant" public policy against on-duty intoxication by pilots who are charged with the responsibility for hundreds of lives daily. Thus, far more clearly than *Misco*, this case frames the question whether and when a court may, in order to protect the public safety, refuse to enforce an arbitral award emerging from a process in which, as the district court in this case observed, the travelling public "is not a party . . . , has not participated . . . and has not voluntarily consented to abide by the decision reached." 633 F. Supp. at 793 (App. B at 39a). The Court's resolution of the conflict among circuits on this important and recurring issue would be aided by granting certiorari in this case and hearing it in tandem with *Misco*.

II. THE COURT OF APPEALS' CRIMPED VIEW OF THE "PUBLIC POLICY EXCEPTION" UNDERMINES THIS COURT'S DECISION IN *W.R. GRACE*.

Apart from the conflict among the circuits, this Court should consider the "public policy" question presented by this case because the decision below undermines *W.R.*

Grace and other decisions of this Court. In *W.R. Grace*, this Court recognized that courts may not enforce arbitration awards under collective bargaining agreements "if the contract as interpreted by [the arbitrator] violates some explicit public policy . . ." 461 U.S. at 766. The Court described the scope of the exception as follows:

> "As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. *See Hurd v. Hodge,* 334 U.S. 24, 34-35 (1948) . . . . [T]he question of public policy is ultimately one for resolution by the courts. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests' *Muschany v. United States,* 324 U.S. 49, 66 (1945)." 461 U.S. at 766.

The District of Columbia Circuit, however, has interpreted *W.R. Grace* as meaning that a court must enforce an arbitral award unless (1) the contract as interpreted by the arbitrator is unlawful, or (2) the award commands the commission of an unlawful act. 808 F.2d at 83 (App. A at 12a); *American Postal Workers, supra,* 789 F.2d at 8. In reaching this highly restrictive interpretation of the public policy exception, the court of appeals rather presumptuously substituted its own view of what this Court must have "meant to say" in *W.R. Grace:*

> "[T]he Court meant to say only that an arbitration award may not be enforced *if it transgresses* 'well-defined' and 'dominant' *'laws and legal precedents.'* " 808 F.2d at 83 (App. A at 12a-13a) *quoting American Postal Workers, supra,* 789 F.2d at 8 (emphasis added).

The court of appeals' view that the contract or award must be enforced unless it directly violates positive law, however, is not faithful to this Court's analysis in *W.R. Grace* nor in the prior cases upon which *W.R. Grace* drew.

1. In *W.R. Grace,* this Court employed a two-step analysis to determine the circumstances under which a court must refuse to enforce a labor arbitration award on "public policy" grounds. A court must determine, first, whether the arbitral award implicates a "clearly-defined and dominant" public policy and, second, whether the award "compromise[s]" that public policy. *Id.,* 461 U.S. at 766-767.

The arbitral award in this case meets both prongs of the *W.R. Grace* analysis. The maintenance of "the highest possible degree of safety" in air transportation is a "clearly-defined and dominant" federal policy. It is the explicit mandate of the Federal Aviation Act, which imposes upon air carriers a duty to put the safety of its passengers above all else. 49 U.S.C. §§ 1302(a), 1421. Moreover, federal courts have long recognized safety as an air carrier's paramount obligation.[2] Even more precisely, there also is a dominant public policy, well defined in federal regulations, state statutes, NTSB decisions and judicial holdings, that those involved in public trans-

[2] *See, e.g., Air East, Inc. v. National Transportation Safety Board,* 512 F.2d 1227, 1232 (3d Cir.), *cert. denied,* 423 U.S. 863 (1975); *United Air Lines, Inc. v. Wiener,* 335 F.2d 379, 396 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964); *Murnane v. American Airlines, Inc.,* 482 F. Supp. 135, 146 (D.D.C. 1979), *aff'd,* 667 F.2d 98 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

portation who drink and jeopardize safety are unworthy of the public trust.[3]

There can be no question that forcing an airline to reinstate a pilot who disregarded his responsibility to his passengers and actually jeopardized their safety by flying drunk implicates and "compromises" both of those related public policies. The court of appeals, however, glossed over the public safety issue and held that the court had to enforce the Morrison award because "there is nothing in the law prohibiting" Northwest from "allowing reformed alcoholics to fly as pilots . . . ." 808 F.2d at 83 (App. A at 13a).[4]

At a time when the Nation is understandably concerned about alcohol-related carnage on our highways and about alcohol and drug abuse in the public transportation system, it is astounding that the court of appeals blinded itself to the imperative public policy at stake. For example, in an effort to deal with this national priority, the FAA has proposed random drug and alcohol testing for certain airline employees, including pilots. FAA, Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 44,432 (December 9, 1986). Indeed, the decision below squarely conflicts with decisions of other circuits holding that the public policy in protecting transportation safety justifies a

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[3] *See* 14 C.F.R. § 91.11(a) (FAA regulations prohibiting a pilot from acting as a crewmember while under the influence of alcohol); NTSB, *Safety Study Statistical Review of Alcohol Related Aviation Accidents* 16, NTSB/SS-84/03 (May 1, 1984) (thirty-eight states have codified "drinking and flying" prohibitions similar to the FAA's regulations); *Petition of Pierce*, NTSB Order No. EA-2057 (August 16, 1984) (drinking-and-flying demonstrates lack of qualification and warrants revocation of pilot's license); *Petition of McGee*, 3 NTSB 4074 (1981), *aff'd mem. sub nom. McGee v. NTSB*, No. 82-1800 (D.C. Cir. May 11, 1983) (flying while intoxicated is inherently reckless and dangerous).

[4] The court of appeals' conclusion begs the question. Not even ALPA has disputed that Northwest discharged Morrison for drinking alcohol within 24 hours of flight duty and for jeopardizing the safety of a flight by acting as a cockpit crewmember while intoxicated, and not because of his claimed alcoholism.

court's refusal to enforce arbitration awards in favor of employees involved in on-duty alcohol-related misconduct.[5]

The court of appeals also asserted that the award here "plainly is not unlawful in its determination that Morrison's alcoholism was an illness that could not support a finding of 'just cause' for dismissal in this case." 808 F.2d at 83 (App. A at 13a). The conclusion that alcoholism may excuse gross misconduct runs counter to yet another well-established public policy, the general principle applied in the criminal and civil law that voluntary intoxication cannot be a defense to wrongful conduct.[6]

Ignoring this extensive fabric of national policy, the court of appeals held that an arbitral award does not implicate *any* public policy unless it itself violates an explicit statutory or judicial prohibition or expressly requires an unlawful act. This Court's analysis in *W.R.*

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[5] *E.g., Amalgamated Meatcutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983) (arbitration award ordering reinstatement of truck driver caught driving while intoxicated violates public policy); *NLRB v. Dixie Motor Coach Corp.*, 128 F.2d 201, 203 (5th Cir. 1942) (same); *NLRB v. U.S. Truck Co.*, 124 F.2d 887, 890 (6th Cir. 1942) (same). *Accord Amalgamated Transit Union v. Mass Transit Administration*, 305 Md. 380, 504 A.2d 1132 (1986) (Maryland "public policy would require discharge for drunken driving of a public bus."). *Cf. Borsari v. FAA*, 699 F.2d 106 (2d Cir.), *cert. denied*, 469 U.S. 833 (1983) (FAA justified in dismissing air traffic controller for off-duty possession of marijuana).

[6] *See, e.g., United States v. Scott*, 529 F.2d 338 (D.C. Cir. 1975); *Essex v. Virginia*, 322 S.E.2d 216 (Va. 1984); W. Prosser & W. Keeton, *Law of Torts* § 32 at 178 (5th ed. 1984) ("it is uniformly held that voluntary or negligent intoxication cannot serve as excuse for acts done in that condition . . ."). *See also In re Crowley*, 519 A.2d 361 (N.J. 1986) (alcoholism is not a mitigating factor in disciplinary action for attorney's misappropriation of client funds). *Cf.* Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-1(c)(1) (disciplinary action for alcohol-related misconduct is not discriminatory); *Spragg v. Campbell*, 466 F. Supp. 658, 660 (D.S.D. 1979) (Act does not protect alcoholic FAA employee from discharge for alcohol-related misconduct).

Grace does not have such a narrow focus. While the Court in *W.R. Grace* considered five factors in determining whether the arbitral award "compromised" the public policy at issue, 461 U.S. at 767-771, the court below ignored four of those five and instead myopically focused only on one factor mentioned by this Court—whether the award compels unlawful action.[7]

The court of appeals' fixation on compelled "unlawful conduct" as the only factor that will justify nonenforcement of an arbitration award thus "overrules" four-fifths of this Court's decision in *W.R. Grace.* Other circuits have rejected such a limited reading of *W.R. Grace* and this Court should do so as well.

2. The court of appeals' conclusion that courts can find "public policy" only in explicit statutory or judicial prohibitions also conflicts with other decisions of this Court, including those undergirding *W.R. Grace.* As this Court acknowledged in *Twin City Pipe Line Co. v. Harding Glass Co.,* 283, U.S. 353, 356 (1931), speaking of the concept of "public policy," there is "no fixed rule by which to determine what contracts are repugnant to it."

Thus, in *Hurd v. Hodge,* 334 U.S. 24 (1948), for example, the Court held on public policy grounds that a federal court could not enforce racially restrictive covenants between private parties, even though the contracts at issue were not themselves unlawful and did not compel unlawful action. The Court found that the public policy of

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[7] In *W.R. Grace* the Court considered (1) whether the award would require one of the parties to violate an explicit statutory, regulatory, or judicial command, 461 U.S. at 766-68, (2) whether the conflict between the enforcement of the award and the public policy at issue was the result of voluntary conduct by the party seeking nonenforcement, *id.* at 767, (3) whether the award would create an incentive for one of the parties (or anyone else) to violate a clearly-defined public policy, *id.* at 769-70, (4) whether enforcement of the award would be "so unfair" as to violate public policy, *id.* at 770, (5) whether other important policies would be inappropriately affected by the court's action, *id.* at 771.

the United States, as gleaned from the Constitution, the Civil Rights Act and prior decisions, prohibited the federal courts from lending their coercive power to such offensive covenants.

Indeed, this Court has held perfectly ordinary contracts unenforceable on the ground that enforcement would tend to induce conduct contrary to public policy. *See, e.g., Burt v. Union Central Life Ins. Co.*, 187 U.S. 362 (1902) (refusing to enforce life insurance policy where the insured had been executed following his conviction for capital murder because economic interest of beneficiary may color beneficiary's testimony at insured's trial); *Crocker v. United States*, 240 U.S. 74 (1916) (contingent fee contracts invalid because of tendency to induce improper solicitation of public officials). *See also A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 44-45 (1941) ("controlling factor" in public policy analysis is the effect of enforcing the contract on "the end which Congress intended to accomplish"). The court below made no attempt to reconcile its approach with that line of cases, which this Court treated as sound when it relied on them in *W. R. Grace.*

3. If the court of appeals had applied the correct test under *W.R. Grace*, it would have affirmed the district court's refusal to order Northwest to put Morrison back in the cockpit. The arbitral award compromises both the federal statutory policy mandating "the highest possible degree of [air] safety," 49 U.S.C. §§ 1302(a), 1421(b), and the public policy prohibiting "drinking and flying." The Morrison award undermines air safety by forcing an air carrier to employ a pilot in whom the carrier—for good reason based on actual experience—lacks the confidence necessary for it to entrust to him the responsibility for hundreds of lives.

Taking comfort in the FAA's recertification of Morrison, however, the court below concluded that "[t]o

suggest that the Board's award violates public policy is to contend that the FAA was derelict in its responsibilities in considering Morrison for recertification." 808 F.2d at 83 (App. A at 13a). The court's conclusion reflects a fundamental misunderstanding of the congressional scheme for ensuring the highest degree of air safety. The Federal Aviation Act mandates *both* that the FAA set minimum standards for airmen qualification, 49 U.S.C. § 1421(a), *and* that air carriers act to maintain the "highest degree of safety," 49 U.S.C. § 1421(b). The FAA's reissuance of airman and medical certificates to Morrison, therefore, may discharge the FAA's obligation to assure that pilots meet *minimum* requirements for technical skill and physical aptitude.[8] The FAA's action, however, does not relieve Northwest of its independent statutory responsibility to assure air safety by employing only pilots that Northwest believes have the character and judgment necessary to protect the safety of its passengers. *See also* 14 C.F.R. § 121.413(a)(4)(ii).

The Morrison award, by focusing only on FAA certification as an assurance of safety, recognizes only one leg of the Federal Aviation Act's two-legged scheme for assuring the safest possible air transportation system, a scheme which vests independent safety obligations in air carriers. *Compare* 49 U.S.C. § 1302(a) *with* 49 U.S.C. § 1421(b). The award thus frustrates and undermines a vital part of the federal regulatory scheme.

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[8] Northwest challenged the FAA's reissuance of medical and airmen certificates to Morrison in *Northwest Airlines, Inc. v. FAA*, 795 F.2d 195 (D.C. Cir. 1986). The court of appeals held that because Northwest had discharged Morrison and, at that time, was under no obligation to reinstate him (because the district court had vacated the arbitral award), Northwest lacked standing to petition for review of the FAA orders. The court of appeals noted that Northwest raised "serious questions concerning the FAA's policies with respect to alcoholic pilots and those who fly while intoxicated." *Id.* at 197. The court of appeals expressed similar doubts about the legality of the FAA's policies in an earlier challenge by Northwest—also dismissed on procedural grounds—to the recertification of an alcoholic pilot. *Northwest Airlines, Inc. v. FAA (McClellan)*, 675 F.2d 1303, 1304 (D.C. Cir. 1982).

The award also compromises the public policy prohibiting flying while intoxicated. The order to reinstate Morrison despite his admitted intoxication during a flight cannot help but broadcast to other pilots the message that even the most serious breach of the most critical air safety policies may not result in discharge. Under the approach approved by the court of appeals, a pilot who knows that he has a drinking problem also will know that, even if he is caught flying while intoxicated and discharged, he can simply admit himself to an alcoholism rehabilitation facility, try to delay the arbitration of his grievance until a doctor is willing to attest to his progress in controlling alcoholism, and then return to flying as soon as the FAA reissues a medical certificate. The result is to treat that pilot virtually the same way he would have been treated if he had sought treatment before violating the law and endangering the travelling public. The alcoholic pilot thus has no incentive to acknowledge his drinking problem *before* crossing the line and committing the most serious type of pilot misconduct.[9]

As *W. R. Grace* teaches, it is precisely this kind of arbitral award, which provides a stong "incentive" to violate the law, 461 U.S. at 769-70, that is contrary to established public policy and should not be enforced by federal courts. Yet, the decision below is already having the kind of deleterious impact that should raise grave concern about its implications for public safety policy. Thus, referring to the court of appeals' decision in this case, an arbitration board recently ordered Delta Air Lines to reinstate a pilot whom Delta had discharged for acting —while intoxicated—as "pilot-in-command" of a passenger jet. *Grievance of William D. Day,* Delta Air

[9] *Cf. Borsari v. FAA*, 699 F.2d 106 (2d Cir.), *cert. denied*, 464 U.S. 833 (1983) (upholding discharge of air traffic controller involved in off-duty drug dealing because reinstatement could have adverse impact on pilots, other air controllers, and the public at large).

Lines Pilots' System Board of Adjustment, ALPA Case No. 1-85 (January 31, 1987). The decision below is particularly ominous, and should not be permitted to stand.

III. THE CIRCUITS DIFFER WHETHER THE FEDERAL AVIATION ACT IMPOSES SUBSTANTIVE RESTRICTIONS ON THE JURISDICTION OF RAILWAY LABOR ACT ARBITRATION BOARDS.

In addition to the "public policy" question, this case presents the important, unresolved and recurring question of the interplay between an air carrier's safety obligations under the Federal Aviation Act and the mandatory arbitration of grievances under the Railway Labor Act.

The district court concluded that the System Board exceeded its Railway Labor Act jurisdiction "because the Board's decision substantially interferes with air safety responsibilities entrusted to Northwest" by the Federal Aviation Act and not covered by "federal arbitration policy." 633 F. Supp. at 795 (App. B at 43a). The court of appeals' rejection of that holding is at odds with decisions of this Court and the Ninth Circuit.

In another context this Court has ruled that federal labor policy must at times yield to other important federal policies. In *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984), the Court held that:

> "In devising remedies for unfair labor practices the [NLRB] is *obliged* to take into account another 'equally important congressional objectiv[e],' *Southern S.S. Co. v. NLRB,* 316 U.S. 31, 47 (1942)—to wit, the objective of deterring unauthorized immigration that is embodied in the INA." 467 U.S. at 903 (emphasis added).

Applying that principle the Court found that the NLRB, despite its broad discretion under the National Labor Relations Act, could not order unconditional reinstatement and backpay for illegal aliens who had been discharged in violation of that Act. *See also Southern S.S. Co. v. NLRB,* 316 U.S. 31 (1942) (NLRB could not order reinstatement of seamen who had acted unlawfully by refusing to obey orders while on duty, thereby jeopardizing the safety of the ship).

Relying on a similar principle, the Ninth Circuit recognized in *World Airways, Inc. v. International Brotherhood of Teamsters,* 578 F.2d 800, 803 (9th Cir. 1978), that the Federal Aviation Act imposes on the air carrier the non-delegable duty to "determine the competency of its pilots in the interests of public safety." Accordingly, a System Board arbitrator—cloaked as he is solely with authority under the Railway Labor Act and the collective bargaining agreement—may neither usurp nor nullify the carrier's exercise of its statutory duty to members of the travelling public. The court stated:

> "Although the federal policy of resolving labor differences by arbitration is strong, there is also a strong federal policy in ensuring the safety of air travel. In weighing these concerns, we cannot overlook the horrible toll in human life that air crashes can take." *Id.* at 803-04.

Reconciling the two statutory schemes, the Ninth Circuit explained why a system board had exceeded its authority under the Railway Labor Act in ordering retraining for a pilot who had been demoted for repeated errors of judgment:

> "federal law clearly places the responsibility upon the airline to determine whether or not a pilot possesses the judgment to serve as a Pilot-in-Command. The Arbitrator usurped this responsibility." *Id.* at 803.

In *Association of Professional Flight Attendants v. American Airlines, Inc.*, 767 F.2d 1331, 1334 (9th Cir. 1985), the Ninth Circuit reaffirmed its holding in *World Airways.*

In cases like this one, therefore, the Federal Aviation Act imposes limits on the System Board's jurisdiction to resolve a grievance that involves not just a routine employee discharge dispute but the validity of a policy on a public safety issue that the Aviation Act has entrusted to the airline. Although the district court adopted that approach in this case, the court of appeals disagreed.

This Court has not yet addressed the important issue whether arbitrators have complete discretion to make decisions significantly affecting public safety. In *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974), the Court held that issues of *employee* safety are subject to arbitration, but carefully tailored its decision to address *only* that question. *See* 414 U.S. at 379. This case presents the open question of the arbitrability of *public safety* issues.

While employee safety issues are uniquely suited to resolution between an employer and its employees through the collective bargaining process, passenger or consumer safety issues are dramatically different. As the Ninth Circuit explained in *World Airways,* "[w]e are concerned . . . with the safety of the air-traveling public, who are not parties to the [collective bargaining agreement] and are unable to participate in the selection of the arbitrator." 578 F.2d at 803-804 n.8. The district court here agreed. *See* 633 F. Supp. at 793 (App. B at 39a-40a).

Whether and to what extent a System Board established under the Railway Labor Act has the authority to override a safety-based policy established under the Federal Aviation Act is an important issue as to which a

conflict among the circuits exists. This Court should resolve the question.[10]

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for argument in tandem with No. 86-651, *United Paperworkers Int'l Union v. Misco, Inc.*

Respectfully submitted.

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March 1987.

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[10] As the recent *Day* arbitration award (*supra* pp. 18-19) involving Delta Air Lines illustrates, the public safety issue presented here is a recurring one. That arbitral award is now the subject of a lawsuit presenting the same issues in this case. *Delta Air Lines, Inc. v. Air Line Pilots Association, International*, Civil Action No. C87-239A (N.D. Ga. filed Feb. 12, 1987).

Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6228

NORTHWEST AIRLINES, INC.

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-03434)

Decided January 6, 1987

Before EDWARDS, and Bork, *Circuit Judges*, and SWYGERT,* *Senior Circuit Judge* for the United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Edwards, *Circuit Judge:* In August 1982, following an alcohol-related incident, officials at Northwest Airlines, Inc. ("Northwest") discharged First Officer Larry Morrison. Subsequently, pursuant to a grievance filed by the Air Line Pilots Association ("ALPA"), a panel of the Northwest Airline System Board of Adjustment (the "Board") issued an arbitration award finding that, because the pilot was suffering from alcoholism, Northwest's discharge of Morrison was without "just cause" under the terms of the Northwest-ALPA collective bargaining agreement. The Board ruled that Morrison should be offered reinstatement, without back pay or benefits, upon certification by the Federal Air Surgeon that Morrison had recovered from the effects of his alcoholism, including total abstinence from alcohol for not less than two years. Morrison successfully completed an alcohol rehabilitation program and was thereafter recertified by the Federal Aviation Administration ("FAA") in 1985.

In 1985, Northwest filed a complaint in District Court seeking to set aside the Board's arbitration award. The District Court issued a summary judgment for Northwest, finding that the Board's award was inconsistent with public policy. ALPA now seeks review of the trial court's judgment, contending that the District Court acted in excess of its authority in overturning the Board's arbitration award. Because we find that the District Court had no valid basis upon which to set aside the Board's award, and because we hold that the trial court's decision is plainly at odds with well-established Supreme Court precedent and with this court's recent decision in *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), we reverse.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

Generally, a labor arbitration award must be enforced if the arbitrator acts within the confines of his jurisdiction and his award draws its essence from the parties' collective bargaining agreement; this is so even when a reviewing court disagrees with the arbitrator's judgment on the merits. In some limited circumstances, an arbitration award may be set aside if it is found to be violative of "public policy." However, as we made clear in *Postal Workers*, "judges have no license to impose their own brand of justice in determining applicable public policy; thus, the exception applies only when the public policy emanates from clear statutory or case law, '*not from general considerations of supposed public interests.*' " *Id.* at 8 (emphasis in original). There can be no doubt that the Board's award in the instant case does not require the invocation of a public policy exception; therefore, the District Court had no authority to substitute its judgment for that of the parties' lawfully designated arbitration panel. Accordingly, the District Court's order is hereby vacated and the case remanded with instructions to enter judgment in favor of the Air Line Pilots Association.

I. Background

Prior to his discharge, First Officer Larry Morrison had been with Northwest for sixteen years and had a theretofore unblemished disciplinary record. Morrison was dismissed by Northwest on August 6, 1982, after he was discovered piloting a Northwest flight within twenty-four hours after consuming alcohol. Morrison had been drinking during a thirty-hour stopover between flights and then had become ill three hours before his next scheduled flight. He asked to be replaced on his scheduled flight; however, after being informed that no replacements were available, Morrison agreed to serve as co-pilot for the first two legs of the flight, provided that he could be replaced on the final leg. At the first stopover, in San Francisco, Northwest officials insisted that Morrison submit to a blood test, which showed Morrison's blood alcohol level to be at .13%. Under California law, a blood alcohol level of .10% creates a

presumption of intoxication,[1] and FAA regulations prohibit any person from serving as a crew member with a blood alcohol level of .04% or more.[2]

Northwest investigated the incident, and discharged Morrison for violating company regulations prohibiting the consumption of alcohol within twenty-four hours of flight duty, and for being under the influence of alcohol during the flight. Northwest prohibits crew members from using alcoholic beverages during the twenty-four-hour period immediately preceding the departure time of a flight to which that person has been assigned.[3] Violation of the rule may be grounds for discharge.[4] Northwest does, however, allow reformed alcoholics to be pilots.[5]

Morrison admitted to Northwest officials that he had a ten-year history of drinking, but until the incident of August 1, 1982, he had never sought treatment for his drinking problem, fearing that he would be discharged. He also admitted that he had probably violated the twenty-four-hour rule in the past. Immediately after being discharged by Northwest, Morrison successfully completed a comprehensive alcohol treatment program and had not consumed alcohol since.

A grievance was filed before the Board to determine whether Northwest's discharge of Morrison was for just cause, and, if not, what the appropriate remedy should be. During a two-day arbitration hearing, the parties attested that the matter was properly before the Board; the parties were then afforded full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. After considering the evidence before it and reviewing post-hearing briefs, the Board issued a written opinion, holding that the discharge was without just cause and that Morrison should be offered reinstatement,

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[1] *See Northwest Airlines, Inc. v. ALPA*, No. 84-3434, slip op. at 4 n.1 (D.D.C. Nov. 27, 1985), *reprinted in* Record Excerpts ("R.E.") 6, 9 n.1.

[2] 14 C.F.R. § 91.11(a)(4) (1986).

[3] *See Northwest Airlines, Inc.*, slip op. at 12 n.4, *reprinted in* R.E. 17 n.4. FAA regulations require that a crew member abstain from drinking during the eight-hour period prior to a flight. 14 C.F.R. § 91.11(a)(1) (1986).

[4] *See Northwest Airlines, Inc.*, slip op. at 12 n.4, *reprinted in* R.E. 17 n.4.

[5] *Id.* at 13, *reprinted in* R.E. 18.

without back pay or benefits, at such time as the Federal Air Surgeon certified that he met the standards of 14 C.F.R. § 67.13(d)(1)(i)(c) (1986).[6] Morrison was certified by the FAA on September 13, 1985.[7]

In reaching its decision, the Board considered and rejected several less severe remedies. For example, as of January 10, 1984, the FAA Federal Air Surgeon had declared Morrison to be eligible for a special issuance of a first-class medical certificate.[8] This would have permitted him to pilot commercial aircraft so long as he received periodic reports from Northwest, ALPA and his physician indicating that he had abstained from drinking alcohol. However, the Board declined to order

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[6] Section 67.13(d)(1)(i)(c) provides that a pilot may not have an established medical history or clinical diagnosis of

> (c) Alcoholism, unless there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol for not less than the preceding 2 years. As used in this section, "alcoholism" means a condition in which a person's intake of alcohol is great enough to damage physical health or personal or social functioning, or when alcohol has become a prerequisite to normal functioning.

[7] *See Northwest Airlines, Inc. v. FAA* 795 F.2d 195, 200 (D.C. Cir. 1986).

[8] *Northwest Airlines, Inc. ALPA*, No. 82-23, slip op. at 39 (Oct. 29, 1984) ("Board Op."), *reprinted in* R.E. 53, 91. 14 C.F.R. § 67.19 (1986) provides in pertinent part:

> (a) At the discretion of the Federal Air Surgeon, a medical certificate may be issued to an applicant . . . if the applicant shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering air commerce during the period in which the certificate would be in force. The Federal Air Surgeon may authorize a special medical flight test, practical test, or medical evaluation for this purpose.
>
> . . . .
>
> (d) In issuing a medical certificate under this section, the Federal Air Surgeon may do any or all of the following:
>
> (1) Limit the duration of the certificate.
>
> (2) Condition the continued effect of the certificate on the results of subsequent medical tests, examinations, or evaluations.
>
> . . . .

Northwest to conditionally reinstate Morrison, insisting that Morrison meet the more stringent standard embodied in 14 C.F.R. § 67.13(d)(1)(i)(c).

The Board also declined to award any fringe benefits, including sick leave and medical leave, back pay or accumulation of longevity during Morrison's period of rehabilitation. It did so, in part, in recognition of the safety-related goals of the twenty-four-hour rule.[9] The Board took pains to point out that its decision "should not be construed to mean that the Company cannot, under its present policy, terminate rule violators who are found to be alcoholics. . . . Those alcoholics who do not come forward before breaking the rules are still subject, upon a full review of the facts and their medical condition, to the severest of consequences, including termination."[10] Thus, the Board's ruling was limited to the facts before it and was not a rejection of the twenty-four-hour rule. The Board concluded its decision as follows:

> Inasmuch as the Federal Air Surgeon has the statutory authority to make [medical fitness] determinations and must do so with the highest regard for air safety, the Chairman is of the opinion that the award herein is consistent with public policy and within the Board's authority to make.[11]

Northwest filed a complaint in the District Court seeking to set aside the award. ALPA responded by seeking enforcement of the award. On cross-motions for summary judgment, the District Court held for Northwest.[12] The trial court viewed the case as placing two federal policies in conflict. On the one hand, the trial judge recognized that there is a clear federal policy in favor of resolving labor disputes through arbitration.[13] However, the judge saw the Board's award as inconsistent with the federal duty imposed on airlines to ensure

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[9] *See* Board Op. at 41, *reprinted in* R.E. 93.

[10] *Id.* at 42, *reprinted in* R.E. 94.

[11] *Id.* at 43-44, *reprinted in* R.E. 95-96.

[12] *Northwest Airlines, Inc. v. ALPA*, No. 84-3434 (D.D.C. Nov. 27, 1985), *reprinted in* R.E. 6.

[13] *Id.* at 23, *reprinted in* R.E. 28.

airline safety. The court held that the remedy arrived at by the Board impermissibly impinged on Northwest's duty to ensure air safety.[14] The District Court apparently gave no credence to the fact that the parties' agreement to arbitrate does not exclude safety-related grievances. Indeed, even though the parties' collective bargaining agreement plainly gives the Board the authority to review all employee dismissals, and to mitigate disciplinary penalties found to be without just cause, the trial judge inexplicably thought that the better course would be to leave Northwest free to implement its safety policy.[15] ALPA now contends that the District Court acted in excess of its authority in substituting its judgment for that of the Board.

II. Analysis

There are two principal issues in this case: (1) whether the Board had the authority to consider whether Northwest had "just cause" to dismiss Morrison and (2) whether the Board's decision, if within its jurisdiction, was contrary to public policy. Because the Board clearly had jurisdiction to decide this issue and because its decision was not contrary to public policy, the Board's award must be enforced.

A. *Scope of the Board's Jurisdiction*

The requirement of grievance arbitration through Boards of Adjustment in the airline industry, and judicial review thereof, are specifically addressed in the Railway Labor Act ("RLA").[16] Under 45 U.S.C. § 184 (1982), "[t]he disputes between an employee . . . and a carrier . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to an appropriate adjustment board." Moreover, "[i]t shall be the duty of every carrier and of its employees . . . to establish a board of adjustment" to hear and resolve contract grievance disputes. *Id.*

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[14] *Id.* at 36, *reprinted in* R.E. 41.

[15] *Id.*

[16] 45 U.S.C. §§ 151-188 (1982). Portions of the RLA have been made applicable to airlines. *See* 45 U.S.C. § 181 (1982).

The RLA provides further that Board awards "shall be final and binding upon both parties to the dispute." [17] In reviewing an arbitration decision under the RLA, a district court "may not . . . set aside [an award] except for failure of the [Board] to comply with the requirements of [law], for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." [18] This standard has been described as "amongst the narrowest known to the law." [19] And as the Supreme Court has put it:

> The dispositive question is whether the party's objections to the . . . Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. . . . We have time and again emphasized that this statutory language means just what it says.[20]

The only point at issue in this case is whether the Board's decision falls within the scope of its jurisdiction.

Upon review of the parties' collective bargaining agreement, there can be no serious doubt regarding the Board's authority to review Morrison's discharge. Section 3.A.3. of the applicable Northwest-ALPA collective bargaining agreement states that a pilot may be "discharged for just cause." [21] Under Section 19.B. of the parties' agreement, any pilot who is disciplined or dismissed by Northwest has "the right to appeal to the 'Northwest Airlines Pilots' System Board of Adjustment,' as provided in Section 21, provided such appeal is made within thirty (30) days from the date of receipt by the pilot . . . of the decision of the Company." [22] And, under Section 21.D., the Board has "jurisdiction over disputes between any employee covered by the Pilots' Agreement and the Company growing

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[17] 45 U.S.C. § 153 First (m) (1982).

[18] 45 U.S.C. § 153 First (p) (1982).

[19] *Diamond v. Terminal Ry. Ala. State Docks*, 421 F.2d 228, 233 (5th Cir. 1970).

[20] *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93 (1978) (referring to identical language in 45 U.S.C. § 153 First (q) (1982)).

[21] Agreement Between Northwest Airlines, Inc. and the Air Line Pilots, *reprinted in* Record Before the System Board of Adjustment (Vol. II) Tab 7.

[22] *Id.*

out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement." [23] It is absolutely clear, from these explicit terms of the agreement, that an unresolved grievance claiming the absence of "just cause" with respect to a disciplinary action taken against a pilot is a "dispute" within the jurisdiction of the Board. It is also clear under Section 21.J. of the agreement that the decision of the Board with respect to such a "dispute" "shall be final, binding and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute." [24]

In view of the foregoing provisions, the conclusion is inescapable that the Board acted within its authority in considering Morrison's claim that he had been fired without "just cause." And in reviewing this grievance, it is equally plain that the Board was authorized to judge the legitimacy of the disciplinary penalty imposed in the light of mitigating circumstances. This is hardly surprising because "[a]rbitral determination not only of the existence of misconduct but of the fitness of the punishment is routinely grist for the arbitral mill." [25] The fact that the arbitration touches on issues related to airline safety is irrelevant. There have been numerous arbitrations under the RLA involving grievances that implicate safety issues, and no court has ever ruled that an arbitral board lacked jurisdiction to consider such issues.[26]

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[23] *Id.*

[24] *Id.*

[25] *Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers*, 416 F.2d 198, 202 n.10 (5th Cir. 1969).

[26] *See, e.g., Association of Professional Flight Attendants v. American Airlines, Inc.*, 767 F.2d 1331 (9th Cir. 1985); *ALPA v. Eastern Air Lines, Inc.*, 632 F.2d 1321 (5th Cir. 1980); *World Airways, Inc. v. International Bhd. of Teamsters, Airline Div.*, 578 F.2d 800 (9th Cir. 1978); *Northwest Airlines, Inc. v. ALPA*, 373 F.2d 136 (8th Cir.), *cert. denied*, 389 U.S. 827 (1967). Although the *World Airways* court held that the arbitrator exceeded his authority, 578 F.2d at 801, the Ninth Circuit clarified its *World Airways* holding in *American Airlines*, 767 F.2d at 1334, stating that it was the arbitrator's *remedy* in *World Airways* that was inappropriate: "That is, it was the remedy ordered that went beyond the arbitrator's authority, not the mere consideration of the safety issue. A less intrusive remedy might well have fared differently."

There is *nothing* in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review. Indeed, quite the contrary is true because *all* disciplinary actions taken pursuant to Section 19 are made subject to Board review under Section 21. There is no conceivable way to construe the parties' agreement as removing from the Board's jurisdiction disciplinary actions related to alleged breaches of the twenty-four-hour rule. Moreover, even if we could find some ambiguity in the parties' agreement, our decision would be the same. The Supreme Court has made it clear that, "[b]ecause the authority of arbitrators is a subject of collective bargaining, just as any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." [27] So long as the arbitrator's decision "draws its essence from the collective bargaining agreement," [28] it must be enforced. In the instant case, the Board considered a matter within its jurisdiction and the award was based solely upon the Board's construction of the collective bargaining agreement; therefore, because the award is not otherwise inconsistent with the law, it cannot be overturned by a reviewing court.

There is no support for the District Court's imposition of a presumption against arbitration of safety issues. Indeed, the precedent is to the contrary. The Supreme Court, most recently in *AT&T Technologies, Inc. v. Communications Workers,* [29] has clearly stated that doubts about the arbitrability of issues should be resolved in favor of coverage:

> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not

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[27] *W.R. Grace & Co. v. Local 759, Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 765 (1983).

[28] *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).

[29] 106 S. Ct. 1415, 1419 (1986) (citation omitted) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83, 584-85 (1960)).

> be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

In this case, Northwest has not introduced *anything* to suggest that this issue was *not* subject to arbitration, let alone provided "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." In all critical respects, then, this case involves a straightforward application of well-established law concerning the *limited* role of the courts in reviewing labor arbitration awards:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written in-

> strument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.[30]

B. *Public Policy*

Although it is clear that the Board acted within the scope of its authority and that its award draws its essence from the agreement, Northwest suggests that the Board's decision is somehow contrary to public policy, and that, because of this, the Board's decision should not be enforced. This contention is meritless.

In *American Postal Workers Union v. United States Postal Service,*[31] we recently addressed the extent to which an arbitration award may be vacated on the ground of "public policy." In *Postal Workers,* we explained the "public policy exception" as follows:

> [I]t is well-understood that courts will not enforce an arbitration award if the award itself violates established law or seeks to compel some unlawful action. However, this rule, which is sometimes referred to as a public policy exception, is *extremely narrow.* In *W.R. Grace,* the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of "public policy." . . . [I]t is plain from the language in *W.R. Grace* itself that the Court meant to say only that an arbitration award may not be enforced if it transgresses "well defined" and "dominant" "laws and

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[30] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567-68 (1960) (footnote omitted).

[31] 789 F.2d 1 (D.C. Cir. 1986).

> legal precedents." It is also clear from the opinion in *W.R. Grace* that judges have no license to impose their own brand of justice in determining applicable public policy; thus, the exception applies only when the public policy emanates from clear statutory or case law, "*not from general considerations of supposed public interests.*" [32]

Under this principle of "public policy," there is no basis upon which to set aside the Board's award in this case.

The Board's decision merely required Northwest to reinstate Morrison if and when he was recertified by the FAA as fully fit and licensed to fly. The award plainly is not unlawful in its determination that Morrison's alcoholism was an illness that could not support a finding of "just cause" for dismissal in this case. Indeed, even Northwest has a policy of allowing reformed alcoholics to fly as pilots, and there is nothing in the law prohibiting such a result.

Furthermore, the Board's award was conditioned upon a finding by the FAA—*i.e.*, the authorized public agency responsible for licensing pilots—that Morrison was fit and qualified to fly. To suggest that the Board's award violates public policy is to contend that the FAA was derelict in its reponsibilities in considering Morrison for recertification. Obviously, it would be patently absurd for us, under the guise of "public policy," to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue. Unless the FAA's decision to recertify Morrison is overturned pursuant to some lawful administrative or judicial proceeding designed to consider such matters, we must assume the legitimacy of Morrison's recertification. It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty. At its core, Northwest's argument seeks just such a result, which would require this court to impose its "own brand of justice in determining applicable public policy." We decline the invitation.

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[32] *Postal Workers*, 789 F.2d at 8 (quoting *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))) (emphasis in original) (footnotes omitted).

We understand that Northwest has an interest in applying reasonable safety rules to its pilots. However, it is not the role of the courts to alter the labor-management balance struck in the collective bargaining argeement. Northwest is free to negotiate with ALPA to remove the application of safety rules from the jurisdiction of the Board or to reduce the amount of discretion given to the Board on such matters. Alternatively, if Northwest believes the FAA's certification standards to be lax, it can lobby the FAA to change its standards or seek statutory relief from Congress. But, so long as the Board acts within its jurisdiction and its awards draw their essence from the collective bargaining agreement, and neither contravene established law nor require an unlawful act, *Enterprise Wheel, W.R. Grace, Postal Workers* and like precedent under the RLA compel that such awards be enforced.[33]

III. Conclusion

For the reasons set forth above, the judgment of the District Court is reversed. The case is remanded to the trial court with instructions to enter judgment for the appellant.

So ordered.

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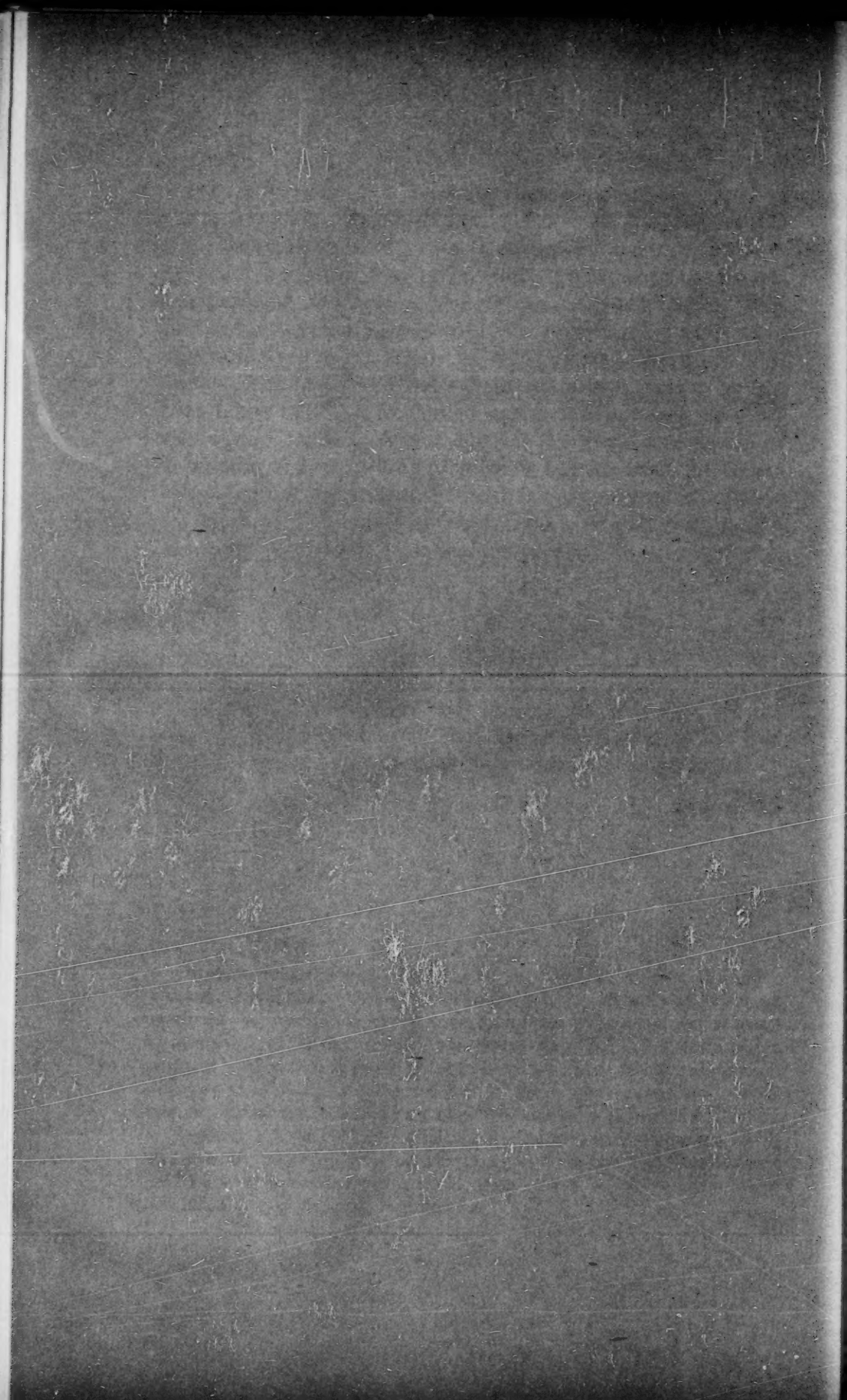
[33] Without assessing its relevance, we note that this is not a situation in which the Board has permitted a drunkard to pilot an aircraft, nor did it treat lightly the fact that Morrison had flown an aircraft while under the influence of alcohol. The Board carefully considered all safety issues and applied stringent prerequisites to allowing Morrison to fly again. Indeed, if Morrison had been an alcoholic, and had not been shown to have violated the 24-hour rule, Northwest concedes that the company would have allowed him to return to his position following FAA certification. The only issue before the Board was whether the added fact that Morrison had been found to have violated the 24-hour rule should alter the result. After careful deliberation, the Board concluded that, in this case, it should not.



Appendix B

NORTHWEST AIRLINES, INC., Plaintiff,

v.

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL Defendant.

Civ. A. No. 84-3434

United States District Court, District of Columbia.

Nov. 27, 1985

MEMORANDUM OPINION AND ORDER

JOYCE HENS GREEN, District Judge.

Before the Court are the parties' cross motions for summary judgment. Plaintiff Northwest Airlines (Northwest, Company) contests an arbitration award rendered by the Northwest Airlines, Inc. Pilots' System Board of Adjustment (the Board). That award ordered the reinstatement of a Northwest pilot charged with flying a Northwest commercial passenger flight while under the influence of alcohol. Northwest seeks an order of this Court setting aside the award on the grounds that the arbitration Board exceeded its jurisdiction, acted contrary to law, and "violate[d] public policy." Defendant Air Line Pilots Association (ALPA), in turn, requests that the Court uphold the award and enforce the reinstatement order. ALPA contends that (1) the Board acted within the scope of its jurisdiction as defined under Section 204 of the Railway Labor Act, 45 U.S.C. § 184, and (2) the Northwest-ALPA collective bargaining agreement, and that both the Board's findings and conclusion are entitled to substantial deference upon review. ALPA further contends that the Board's decision is neither contrary to law nor inconsistent with traditional public policy concerns.

For the reasons set forth below, the Court concludes that summary judgment must be granted in favor of the plaintiff.

I. *Factual Background*

Both parties agree that the material facts are not in dispute. Plaintiff Northwest Airlines, Inc. is a commercial passenger airline with air carrier service to a variety of cities within the United States and abroad. Defendant ALPA, an unincorporated association, is a labor organization. ALPA has served in the past—and currently still serves—as the collective bargaining representative for all pilots employed by Northwest. Larry W. Morrison is a former Northwest pilot.

On Friday, July 30, 1982, Morrison served as the co-pilot of Northwest Flight 125. The flight originated in Minneapolis, Minnesota, stopped briefly in Spokane, Seattle, and San Francisco, and concluded its journey in Las Vegas, Nevada. The plane arrived in Las Vegas at approximately 7:00 p.m. on the evening of the 30th. Morrison's expected stay in Las Vegas was to be brief; the reverse flight of flight 125—flight 81—was scheduled to leave approximately 30 hours later, at 7:40 a.m. on August 1, with Morrison once again serving as co-pilot. Majority Opinion (Maj.Opin.), System Board of Adjustment at 3.

On his arrival in Las Vegas, Morrison ate a sandwich, drank a beer, and bought two pints of vodka. *Id.* At "around midnight" of the 30th, *id.*, Morrison "chug-a-lugged" approximately ¾ of a pint of vodka in his room at the Hilton Flamingo Hotel, DX 5 at 3-4, and then went to sleep. When he awoke at 8:00 a.m. the next morning he "chug-a-lugged" an additional quarter pint of vodka, Maj. Opin. at 3, and then went back to sleep.

Waking for the second time at 2:30 p.m. on the afternoon of the 30th, Morrison decided to sunbathe at the hotel pool. There Morrison ordered and drank two double vodkas. *Id.* That evening Morrison ate at an Italian restaurant and consumed a liter of wine. He returned to his hotel room around 10:00 p.m., "chug-a-lugged" approximately ¾ of the second pint of vodka, and went to sleep. *Id.* at 4. Around 4:00 a.m.

the next morning, less than four hours before the scheduled departure of Flight 81, Morrison awoke and finished the second bottle of vodka. *Id.*

At 6:30 a.m. the crew for Flight 81 gathered in the lobby of the Hilton Flamingo in preparation for the trip to the airport. Morrison did not appear. Second Officer Donald Allan called Morrison's room, spoke with Morrison, and reported to the rest of the crew that Morrison was sick, but would be right down. Soon thereafter Morrison paged John Dill, captain of Flight 81, from his hotel room and informed him that he (Morrison) was to ill to make the flight. Captain Dill immediately contacted Northwest's scheduling office to find a replacement for Morrison. Unable to locate a replacement, Northwest instructed Dill that if Morrison could not fly, the flight would have to be cancelled. Dill relayed this information to Morrison, and the latter agreed to make the flight—provided that Dill would fly the San Francisco and Seattle legs and that a substitute first officer would be brought on in Seattle. *Id.* at 4.

Dill and Morrison travelled to the airport together, arriving well before flight time. The Northwest station agent at the airport noticed that Morrison did not look well, and reported his observations to Northwest General Manager Donald Nelson. Nelson attempted to prevent Flight 81 from taking off, but his order was received only after the plane was airborne. Nelson then contacted Northwest representatives in San Francisco and left orders for Morrison to be replaced when the plane touched down. Nelson also instructed Northwest personnel to take a blood sample from Morrison upon his arrival in San Francisco.

At approximately 9:00 a.m. on August 1, 1982, Flight 81 touched down safely in San Francisco. Morrison was immediately replaced as first officer and directed to submit to a blood test. After some hesitation and consultation with an ALPA representative, Morrison agreed to cooperate. The test was administered at 10:46 a.m.—over two and one-half hours after Flight 81 had taken off from Las Vegas—and revealed that

Morrison had a blood alcohol level by weight and volume of 0.13%.[1]

Northwest began an immediate investigation of the events leading up to the August 1, 1982 flight. At an August 6, 1982 Northwest hearing in Minneapolis, Morrison was questioned closely by company officials about past drinking habits and his activities during the Las Vegas layover. Morrison admitted that he had consumed substantial quantities of alcohol less than 24 hours before the departure of Flight 81, but insisted that his illness on the morning of August 1, 1982 was the result of a virus, not the drinking. Morrison confessed to Northwest officials that he had been "drinking straight from the bottle for some 10 years, sometimes consuming a pint of vodka on the 50-mile drive home, that he would drink heavily on the first days of the 3-day Orient layovers he asked for and preferred, that he had suspicions he might be an alcoholic, but never sought treatment because he knew he would be 'canned.' " Maj. Opin. at 6-7. Morrison also told Company officials that the Las Vegas layover was not the first time that he had violated the "24-hour rule."[2] *Id.*

After the hearing Northwest formerly discharged Morrison. The Company concluded, based on the evidence before it, that the discharge was justified because Morrison had violated the Company's 24-hour rule and had flown under the influence of alcohol while serving as a cockpit crew member:

> Your dismissal is the result of your violation of Company rules and regulations prohibiting the consumption of alcoholic beverages within 24 hours of

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[1] In California, a blood alcohol level of 0.10% creates a presumption of intoxication. Federal Aviation Administration regulations prohibit any person from serving as a crew member with a blood alcohol level of 0.04% or greater. 14 C.F.R. § 91.11(a)(4).

[2] Northwest's "24-hour rule" prohibits crew members from using alcoholic beverages during the 24-hour period "immediately preceding departure time [of] any flight to which [an individual has been] assigned as a crew member." PX 8. FAA regulations require only that a crew member abstain from drinking during the 8-hour period immediately preceding the flight. 14 C.F.R. § 91.11(a).

> flight duty. On August 1, 1982, you were assigned to be an operating crew member of Flight 81 LAS-SFO. During the 24-hour period preceding the flight you consumed alcoholic beverages. This constituted just cause for your immediate discharge. Your misconduct was further aggravated in that you consumed sufficient quantities of alcohol so as to be under the influence of alcohol during the flight thereby jeopardizing the safety of the flight.

Id. at 8.

Both parties agreed to certain factual stipulations:

> (1) Larry Morrison admits consuming alcohol in violation of the Company's '24-hour rule' on July 31, 1982 and the morning of August 1, 1982.
>
> (2) Larry Morrison admits serving as a crew member on Flight 81 on August 1, 1982 from LAS to SFO while under the influence of alcohol.
>
> (3) Larry Morrison has not presented a valid First Class Medical Certificate since August 1, 1982, and is not claiming any back pay from that date to the present.
>
> (4) In the State of California, the legal level of blood alcohol establishing a presumption of intoxication is .10% (W/V) or greater. At 10:45 AM on August 1, 1982, Larry Morrison's blood alcohol content was .13% (W/V).
>
> (5) Flight 81 was scheduled to depart LAS on August 1, 1982 at 7:40 AM. It actually departed LAS at 8 AM due to crew delay. Flight 81 was scheduled to depart SFO to SEA at 9:30 AM. It actually departed at 10:05 AM.

Id. at 9.

On August 16, 1982, Morrison protested the discharge and requested a second investigation and hearing. A second investigation and hearing was undertaken, and Northwest

upheld its initial decision. Morrison then appealed to the System Board of Adjustment.[3] At issue before the Board was the question "whether or not the Company had just cause to discharge the grievant? [and] If not, what should the remedy be?" Memorandum in Support of Plaintiff's Motion for Summary Judgment at 6.

At the hearing before the Board, ALPA conceded that Morrison had violated the 24-hour rule, but contended that his discharge "was without just cause because his admitted rule violation was the unavoidable consequence" of alcoholism. Maj. Opin. at 9. ALPA insisted that Morrison had been completely rehabilitated, and had satisfied both the FAA, and Northwest's, requirements for reinstatement to active duty. ALPA did not request retroactive reinstatement. The Association asked the Board only to permit Morrison "to exercise his seniority as any other pilot returning from sick leave." Maj. Opin. at 26.

Northwest, in turn, argued that " 'as a matter of public policy and based on the obligation of a common carrier to promote safety to the highest possible degree, the Board has no jurisdiction to overturn the discharge.' " Memorandum in Support of Plaintiff's Motion for Summary Judgment at 7. The Federal Aviation Act, Northwest noted, "authorizes the *air carrier* to determine what safety policies should [be] adopt[ed] and how ... those policies ... should [be] enforce[d]." *Id* (Emphasis added.) Regardless what the Company knew at the time of the discharge about Morrison's condition, " 'the better approach' is to reject entirely the concept of alcoholism as a defense to a 24-hour rule violation." Maj. Opin. at 25.

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[3] Under the collective bargaining agreement, all "disputes between any employee covered by the Pilots' Agreement and the Company [Northwest] growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement" must be submitted to a three-member panel entitled "The Northwest Airlines Pilots' System Board of Adjustment." Joint Exh. (JX) 1 at 68-69. The Board must include one member appointed by the Company, one member appointed by ALPA, and one "neutral" member.

Over Northwest's objection, the Board considered evidence submitted by ALPA that described and evaluated the medical treatment received by Morrison after the discharge. Reduced to its essence, the evidence purported to show that:

> (1) Morrison voluntarily entered an Alcohol Treatment Program in Washington State one day after the discharge;
>
> (2) after resisting acceptance of his condition at the outset, Morrison made enormous strides toward understanding and controlling his dependency;
>
> (3) on September 4, 1982, Morrison was discharged from the Alcohol Treatment Program after successfully completing the 28-day program;
>
> (4) Morrison continued to meet on a regular basis with small groups of recovering alcoholics to talk over common concerns;
>
> (5) in the 25-month period between the discharge from Northwest and the System Board hearing Morrison did not consume a single alcoholic drink;
>
> (6) on January 10, 1984, the FAA Federal Air Surgeon declared Morrison "eligible for special issuance of a First Class Airman Medical Certificate under Section 67.19 of the Federal Air Regulations," provided that he successfully complete a physical examination, and provided that he continue to test negative for alcohol use on a regular monthly basis.

The Board also heard testimony from medical experts discussing the nature of alcoholism, its origin and symptoms, its effect on those afflicted, and the manner in which it manifested itself in Morrison's particular case. The same experts gave opinions on the severity of Morrison's dependency, and the extent to which Morrison had regained "control" of his life.

After weighing all the evidence, the Board ruled on October 29, 1984 that Morrison had been discharged without just cause. The decision was split, with the Northwest representative voting to affirm the Company's decision. In a lengthy

opinion, the System Board chairman found that "Morrison [had] violated the 24-hour rule on August 1, 1982 and [had] also participated in a flight with sufficient alcohol in his bloodstream to raise a presumption of intoxication. . . ." Maj. Opin. at 27. Chairman Nicolau also found that on the day of the flight Morrison was "an untreated alcoholic" who had "crossed the line separating the problem drinker from one inflicted with the illness of alcoholism." *Id.* Although Nicolau concluded that Morrison was addicted and severely ill on the morning of the flight, he also found that the co-pilot was "out of control", and therefore not capable of performing a "volitional" act. Thus, even though Morrison had "committed serious offenses"—violations "[t]hat must weigh heavily against him"—*id.* at 38, those offenses were the "unavoidable consequence of the illness of alcoholism." That disease, the chairman went on to conclude, had subsequently been "arrested and successfully treated." *Id.* at 39. Indeed, the Chairman noted, the Federal Air Surgeon had found Morrison eligible for a special medical certificate that would clear him to fly provided monitoring requirements were met.

Under these circumstances, and given that Morrison had now regained "control over his behavior and [maintained] abstinence from intoxicants," *id.* at 38, the Board found it reasonable to conclude that reinstatement was appropriate. Accordingly, the Board granted an award offering Morrison reinstatement provided that he met the Federal Air Regulation's non-monitoring provision, *see* § 67.13[d][1][i]. Under that provision, Morrison would not be permitted to fly unless he demonstrated, to the satisfaction of the Federal Air Surgeon, that "established clinical evidence" indicated he had "recover[ed]" and "sustained total abstinence from alcohol for not less than the preceding 2 years." *Id.* In short, the Board granted Morrison a reinstatement, without back pay, fringe benefits, or "accumulation of longevity for pay purposes," on the condition that he demonstrate an ability to perform his duties, under FAA guidelines, without monitoring. *See* Award of System Board of Adjustment.

It is from this award that Northwest now appeals.

II. *Regulatory Framework and Parties' Contentions*

A. *Regulatory Framework*

To understand fully the parties' contentions a brief review of the applicable FAA regulations and Company rules is appropriate.

In order to fly a commercial aircraft in the United States, a pilot must obtain a pilot certificate. 14 C.F.R. § 61.3(a). A pilot must also have "in his personal possession" a "current medical certificate" that satisfies the requirements of 14 C.F.R. § 67. 14 C.F.R. § 61.3(c). Although "no person may act as a crew member of a civil aircraft . . . [w]ithin 8 hours after the consumption of any alcoholic beverage . . .; [w]hile under the influence of alcohol; or [while] using any drug that affects his faculties in any way contrary to safety," 14 C.F.R. § 91.11(a), a history of alcoholism need not preclude the issuance of a valid medical certificate. Under FAA guidelines, a certificate can be held by an admitted former alcoholic if "there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol for not less than the preceding 2 years." 14 C.F.R. § 67.13(d)(1)(i)(c). If a pilot with an established medical history of alcoholism cannot meet the criteria of section 67.13(d)(1)(i)(c), he may still receive a "special issuance" medical certificate from the FAA if the Air Surgeon finds that piloting duties can be performed "without endangering air commerce." 14 C.F.R. § 67.19(a). A special issuance certificate may be issued on the condition that the pilot submit monitoring reports or undergo periodic medical tests. 14 C.F.R. § 67.19(d)(2).

For the most part, Northwest's own safety regulations parallel the FAA requirements. The Northwest Airlines Manual states that "[e]ach flight crew member is individually responsible for the maintenance of valid licenses as required by Federal Aviation Regulations and shall be thoroughly familiar with and shall comply with all FAA regulations pertinent to his licenses and air carrier operations." PX 3D.

In the area of alcohol use, however, the Northwest rules go beyond those provided by the FAA. The FAA's "8-hour rule", for example, has been extended by Northwest into a 24-hour rule. Violation of the rule constitutes grounds for immediate discharge.[4] Similarly, Northwest's policy on returning rehabilitated alcoholics to the cockpit is more severe than that established by the FAA. Although Northwest begins with the assumption that alcoholism is treatable,[5] the Airline's Manual makes clear that alcoholic employees who violate Company rules—in this case the 24-hour rule—may be treated differently from employees with a history of alcoholism who come forward to seek treatment without violating Company rules:

> The establishment of this policy in no way diminishes the Company's right and/or authority to discipline or discharge an employee for conduct that would warrant discipline or discharge of an employee who is not chemically dependent. Neither the availability of this policy, nor participation in any rehabilitation program pursuant to such policy, will excuse an employee from obeying all Company rules and regu-

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[4] *See supra* n. 2. The company's 24-hour rule unequivocally prescribes that:

> "a. The use of alcoholic beverages by crew members while in uniform, on duty, on call or during the 24-hour period immediately preceding departure time on any flight to which assigned as a crew member, is prohibited . . .
>
> . . . .
>
> "f. Violation of any of the above rules shall constitute sufficient cause for discharge."

[5] The Northwest Airlines Manual subsection on "Alcohol, Drugs, and/or Narcotics" states that:

> "The Company recognizes that alcoholism and other forms of chemical dependency are treatable conditions and that early detection and treatment may increase the likelihood of successful rehabilitation. This reference codifies long standing Company policies concerning the use of or addiction to alcohol, drugs, and/or narcotics and is to be used by managers in dealing with contract employees under their supervision. As with any Company policy, this policy will be reviewed for effectiveness and is subject to modification at any time."

PX 8.

> lations, including those pertaining to the use or possession of alcohol, drugs and/or narcotics. An employee's alcoholism or chemical dependency will be no defense to a proven violation of Company rules.

PX 8. Thus, Northwest will permit only a pilot "who does *not* violate the [24-hour] policy but who has . . . a clincial diagnosis of alcoholism" to take a "personal leave of absence for a reasonable length of time for the purpose of obtaining professional assistance." PX 8 (emphasis added).

Likewise, Northwest will only permit a "non-rule breaking" pilot to return to the cockpit if he obtains an *unconditional* medical certification from the Air Surgeon:

> *Exemptions and Return to Service*
>
> a. A pilot who has a history or diagnosis of alcoholism or chemical dependency does not meet the requirements of the Federal Aviation Administration for a medical certificate which is required to permit continued service as a Northwest Airlines pilot *unless such pilot obtains an exemption from the disqualification by the Federal Air Surgeon. In order to return to service as a pilot for Northwest Airlines, the pilot must obtain an exemption which is unconditional* except to the extent continued professional counselling may be required for a reasonable period of time. An exemption which requires monitoring and certification of the continued abstinence of the pilot from alcohol, drugs and/or narcotics either by the Company or any of its employees or by any other person establishes that the Federal Air Surgeon is not satisfied the pilot has overcome the desire and need for alcohol drugs and/or narcotics. Under such circumstances, the pilot is not permitted by the Company to return to flying.

PX 8 (emphasis added). Possession of a "special issuance" medical certificate, although provided for under FAA regu-

lations, *see* 14 C.F.R. § 67.19(d)(2), is insufficient for reinstatement by Northwest:

> *Medical Certification and Alternative Employment*
>
> a. Northwest's responsibility for the safety of the public not only permits but requires Northwest to make judgments on a reasonable basis as to the qualification and fitness of its pilots. It is Northwest's policy that unless and until the Federal Air Surgeon declares a pilot who has been diagnosed as an alcoholic to be free from the desire and need for alcohol so that monitoring of his/her continued abstinence is not required by any person, such pilot shall not be utilized to fly an aircraft.... If the Federal Air Surgeon is unable to declare a pilot free from the desire and need for alcohol, drugs and/or narcotics without monitoring within a reasonable period of time after a personal leave commences, that pilot must consider a career change where his/her propensity for the use of alcohol, drugs and/or narcotics will not endanger the lives and property of other persons. Such pilot will be considered for other employment with the Company.

PX 8.

All of these Company rules were enacted and enforced on the assumption that the FAA regulations set the floor, not the ceiling, for airline safety standards. Northwest is careful to point out that its strict standards are merely the fulfillment of an obligation imposed by the Federal Aviation Act to "perform [its] services with the highest possible degee of safety in the public interest." 49 U.S.C. § 1421(b). This "non-delegable duty", Northwest argues, is in effect a congressional mandate requiring a private air carrier to supply supplemental safety regulations where necessary.[6]

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[6] The Federal Aviation Act, 49 U.S.C. § 1421, states in pertinent part that:

> "(a) The Administrator is empowered and it shall be his duty to promote safety of flight or civil aircraft in air commerce....

(footnote continues)

B. *Parties' Contentions*

In its motion for summary judgment the plaintiff argues that the Board's arbitration award should be set aside on two separate grounds. First, Northwest contends that the Federal Aviation Act "preempts the Board's jurisdiction" over safety related matters. The Act, Northwest maintains, imposes a "non-delegable duty" on air carriers to operate with the greatest degree of safety possible. Northwest's alcohol-related rules were designed to fulfill that statutory obligation. By ruling that Morrison should not have been discharged because his alcoholism provided an "excuse," the Board allegedly nullified Northwest's safety-related policy of not permitting flight crew members to fly while intoxicated, or within 24 hours of drinking. Viewed in this light, Northwest argues, the Board usurped Northwest's authority over safety matters and acted in excess of its jurisdiction.

In presenting this initial contention Northwest does not suggest that it would never reinstate a pilot with a history of alcoholism. Rather, the Company takes the position that, unlike other alcoholic pilots, Morrison demonstrated "a judg-

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(footnote continued)

. . . .

"(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter."

49 U.S.C. § 1421(a), (b).

mental deficiency" in choosing to "take the controls while intoxicated," as opposed to "calling in sick." Plaintiff's Reply at 3. Because the Board's decision "exalted" ALPA's goal of assisting alcoholics over Northwest's safety-related policy choice that rule violators—whether alcoholics or not—do not possess the "necessary character and judgment" to serve as pilots, the Board's decision effectively usurped Northwest's authority under the Federal Aviation Act. Put another way, Northwest argues that the Board lacked jurisdiction "to exalt *any* other objective over [Northwest's] facially reasonable program for protecting aviation safety." Plaintiff's Motion for Summary Judgment at 21. In Northwest's view, the Board's jurisdiction was limited to determining solely whether Northwest "had reasonable grounds for taking the action it [did] on August 6, 1982," Plaintiff's Motion for Summary Judgment at 26, or whether the alleged violation *"in fact* occurred." The Board did not have jurisdiction to "rely on . . . *subsequent* events" to modify or "second guess" the penalty imposed. *Id.* at 29.

Northwest's second major argument focuses on public policy concerns. The Company takes the position that "the over-riding public policy at stake in this case is the clear statutory command that airlines assure . . . the safety of the travelling public." Plaintiff's Motion for Summary Judgment at 32. A court, Northwest insists, may not enforce an arbitration award if the award is "contrary to public policy." Plaintiff's Motion at 29, *citing W.R. Grace & Co. v. Local 759, International Union of Rubber Workers,* 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983). The award issued by the Board in this instance, it is maintained, clearly violated the FAA's stated policy of prohibiting pilots from drinking and flying. Plaintiff's Motion at 33. As such, the award is contrary to the public policy of safeguarding the travelling public.

In response to these arguments, ALPA stresses the "narrow standard of judicial review" traditionally applied to cases involving arbitration awards, and argues that the jurisdiction of the Board is not preempted by the Federal Aviation Act. ALPA points out that "there is nothing in the text of the Act

which states . . . that safety is a matter committed 'exclusively' to air carriers," Defendant's Response to Plaintiff's Motion for Summary Judgment at 2, and maintains that the Board acted well within the scope of its authority in concluding that a penalty less harsh than discharge was appropriate for Morrison's transgressions.

ALPA contends that the Board did not "prefer alcoholic rehabilitation to aviation safety," *id.* at 10, but rather concluded—based on the evidence before it—that Morrison's reinstatement as a pilot posed no danger to air safety because the cause of the rule violations had been eliminated. ALPA emphasizes that the Board did not challenge the inherent validity of the Company's safety rules. To the contrary, the Board merely made a factual determination that Morrison's "judgmental deficiency" had been cured through subsequent treatment for alcoholism.

ALPA further argues that whether the Board possessed the authority to review the discharge decision and determine that the penalty was too severe is a matter of interpretation falling within the exclusive jurisdiction of the arbitrator. This Court, ALPA contends, should not overrule the Board's interpretation of the collective bargaining agreement for the sole reason that the Board's interpretation differs from Northwest's.

Finally, ALPA insists that the public policy against drinking and flying "does not . . . extend to precluding a System Board from ordering the conditional reinstatement of Larry Morrison." Response of Defendant to Plaintiff's Motion for Summary Judgment at 20. ALPA cites the testimony and writings of medical experts who take the position that reinstatement of rehabilitated pilots, like Morrison, poses no added danger to passenger air travel and serves as an incentive to "closet" alcoholic pilots to come forward and seek treatment. By blending rehabilitation and suspension, ALPA concludes, the Board's decision "tends to enhance" the public policy of promoting air safety by "mitigating the disincentive for peer identification of alcoholics who are actual or potential rule breakers . . . [while] offer[ing] no guarantees that dis-

cipline . . . will not be imposed if the circumstances warrant." [7] *Id.* at 22.

III. *Analysis*

A. *Defining the Issue: The Competing Federal Policies*

Northwest is an air carrier as defined under Title II of the Railway Labor Act, 45 U.S.C. § 181 *et. seq.* That Act requires that every carrier and its employees, "acting through their representatives," shall establish a Board of Adjustment to handle disputes "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. § 184. The collective bargaining agreement entered into by ALPA and Northwest incorporates the requirements of section 184. The agreement establishes a System Board to decide "disputes which may arise under the terms of the Pilots' Agreement and which are properly submitted to it." JX 1 at 68-69. The Board "shall have jurisdiction over disputes between any employee . . . and the Company growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement." *Id.*

Matters submitted by joint agreement to arbitration are subject only to a limited judicial review. The Supreme Court has expressly held that where a matter is properly before an arbitrator "the courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim" :

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to

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[7] *See e.g.*, Appendices A-D accompanying ALPA's Motion for Summary Judgment. The theory proferred by ALPA rests on the assumption that harsh penalties—like discharge—serve as a disincentive for alcoholic pilots to admit their dependency and pursue treatment.

> ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . [T]he moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567-68, 80 S.Ct. 1343, 1346-47, 4 L.Ed.2d 1403 (1960).

Deference is, however, not required in all instances. An arbitration decision will be overturned on review if the award purports to cover matters unconnected with the collective bargaining agreement:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960).

Consistent with this essentially narrow standard of review, the Railway Labor Act carefully enumerates the specific grounds required to set aside an arbitration order. Those grounds are limited to three: (1) failure of the board to comply with the provisions of the Railway Labor Act, 45 U.S.C. §§ 151-188; (2) failure of the board to confine itself to matters within its jurisdiction; and (3) fraud or corruption. 45 U.S.C. §§ 184, 153 First (q). *See Ozark Air Lines, Inc. v. Air Line Pilots*, 744 F.2d 1347, 1350 (8th Cir. 1984); *Union Pac. Co. v. Sheehan*, 439 U.S. 89, 93, 99 S.Ct. 399, 401, 58 L.Ed.2d 354 (1978); *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970).

The range of judicial review in Railway Act enforcement cases has been termed "among the narrowest known to the law." *Diamond*, 421 F.2d at 233. Under this statutory scheme, the federal courts must carefully avoid sitting as "super arbitration tribunals," *id.*:

> Once the court determines that the board acted within the scope of its authority—that is, that the board conformed to the limits on its authority set forth in the labor agreement, and that the award draws its essence from the agreement—the court's task is finished. A court will not set aside an award rendered within the scope of the board's jurisdiction either for ordinary error or because the court would itself have reached a different resolution of the merits had the parties submitted the merits for judicial determination in the first instance.

Ozark, 744 F.2d at 1350. The Board's decision must be enforced unless the award is "without foundation in reason or fact." *Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403, 412 (5th Cir. 1969). This test, in turn, hinges on "whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of [the] contract." *Diamond*, 421 F.2d at 233. If the matter is properly before the Board, the arbitrator's factual findings are "conclusive." *Diamond*, 421 F.2d at 233.[8]

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[8] The limited standard of review permitted under the Railway Act is consistent with the Act's own purposes and legislative history. The Supreme Court has recognized that in enacting the Railway Act

> "Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions."

(footnote continues)

As a general matter, the federal policy favoring arbitration of labor disputes embodied in the Railway Act is based on the presumption that " 'arbitration is the substitute for industrial strife.' " *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 1350, 4 L.Ed.2d 1409 (1960), *quoted in Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 378, 94 S.Ct. 629, 637, 38 L.Ed.2d 583 (1974). Because a collective bargaining agreement cannot "define every minute aspect of the complex and continuing relationship between the parties", arbitration serves an invaluable function as a means for resolving "unforeseen disagreements that inevitably arise." *Id.*

At the heart of the policy is respect for the contractual nature of the assignment. It is the arbitrator's construction of the agreement that has been bargained for by the parties. In most instances the labor arbitrator has been chosen "because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment. . . ." *Id.* 363 U.S. at 581-82, 80 S.Ct. at 1352-53. To interfere with this process would upset a private contractual arrangement, frustrate the parties' common goal of maintaining "uninterrupted production," and jeopardize the parties' ability to ensure that the agreement "serve[s] their specialized needs." *Id.*[9]

The legitimacy of the arbitration process, however, hinges on the arbitrator's adherence to the very agreement that the

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(footnote continued)

United Pac. Co. v. Sheehan, 439 U.S. 89, 94, 99 S.Ct. 399, 402, 58 L.Ed.2d 354 (1978) (citations omitted). The "effectiveness" of the Board, the Court reasoned, turns on its ability to keep "minor" disputes out of the courts and its ability to maintain "finality" in decision making. *Id.* A deferential standard of review clearly furthers both of these concerns insofar as it deters appeal of the order, and broadens the grounds for affirmance should an appeal in fact take place.

[9] The federal policy favoring arbitration is clearly stated in section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d):

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

(footnote continues)

parties have "contracted" to honor. The award must "draw its essence" from the collective bargaining agreement, *Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361, and the arbitrator must be careful to confine his order to interpretation and application of the collective bargaining agreement. *Id.* Should the arbitrator "manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.* Clearly, a judicial decision setting aside an order that fails to adhere to the collective bargaining agreement does no violence to the federal policy favoring arbitration because the court is no longer interfering with a ruling "bargained for by the parties." In such a situation, the court is reviewing an order that has strayed from the underlying contractual arrangement.

In the case before the Court, neither side contends that the Railway Act's statutory scheme for judicial review or the federal policy favoring arbitration is inapplicable. At issue here is a second, equally important federal policy involving the safety of air travel. As noted at length above, Northwest contends that the award ordered by the System Board interferes with its responsibility under a conflicting federal statutory scheme set out in the Federal Aviation Act. *See supra* part II. B. This interference, Northwest argues, lifts the Board's decision out of the scope of the arbitrator's jurisdiction and places it squarely within one of the Railway Act's three enumerated grounds for substantive judicial review. Indeed, even Northwest's second argument focuses on air safety; Northwest argues in the alternative that even if the Board's decision does not fall within one of the Railway Act's special provisions, the Board's decision must be set aside because it violates the

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(footnote continued)

> The Supreme Court has made clear that doubts over the applicability of an arbitration clause should be resolved in favor of coverage:
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> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

United Steelworkers, 363 U.S. at 582-83, 80 S.Ct. at 1352-53.

public policy justifications behind the federal "air safety" statutory scheme. *Id.*

The Federal Aviation Act states that "the Administrator [of the Federal Aviation Agency] shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . ." 49 U.S.C. § 1421(b). *See supra* n. 6. Federal regulations promulgated pursuant to the Federal Aviation Act make clear that it is the air carrier's responsibility to evaluate the competency of its pilots and detect defects in training and "personal characteristics that could adversely affect safety." 14 C.F.R. § 121.413(4)(i)(ii).

This Circuit has expressly stated that safety obligations must not be taken lightly:

> The safe transportation of its passengers is the *essence* of [an airline's] business, *see Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 [92 S.Ct. 275, 30 L.Ed.2d 267] . . . (1971), and there exists a Congressional mandate that an airline must operate its business with "the highest possible degree" of care. 49 U.S.C. § 1421(b).
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> . . . .
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> [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely, Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n. 30 (5th Cir. 1976).
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> . . . .
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> [S]afe is not sufficient. Rather, the 'safest' possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.

Murnane v. American Airlines, 667 F.2d 98, 101 (D.C. Cir. 1981).

Similarly, the Ninth Circuit has recognized that "federal law clearly places the responsibility upon the airline to determine whether or not a pilot possesses the judgment to serve as a Pilot-in-Command":

> Federal law has pre-empted the area of aviation. *See* 49 U.S.C. § 1508(a) (1970); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 [93 S.Ct. 1854, 1862-63, 36 L.Ed.2d 547] . . . (1973); *United States v. Christenson*, 419 F.2d 1401, 1403-04 (9th Cir. 1969). Congress had directed the Administrator of the Federal Aviation Administration to give full consideration to the duty resting upon air carriers to perform their services with the highest degree of safety in the public interest. 49 U.S.C. § 1421(b) (1970). The courts have recognized this duty. *Air East, Inc. v. National Transportation Safety Board*, 512 F.2d 1227, 1229 (3d Cir.), *cert. denied*, 423 U.S. 863 [96 S.Ct. 122, 46 L.Ed.2d 92] . . . (1975); *United Airlines, Inc. v. Wiener*, 335 F.2d 379, 389 (9th Cir.), *cert. dismissed sub nom. United Airlines, Inc. v. United States*, 379 U.S. 951 [85 S.Ct. 452, 13 L.Ed.2d 549] . . . (1964).
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> . . . .
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> Failure of an airline to comply with the provisions of the Federal Aviation Act and regulations issued pursuant to the Act can result in both administrative and civil penalties against the carrier. *See Air East, Inc. v. National Transportation Safety Board, supra*, and *In Re Paris Air Crash of March 3, 1974*, 399 F.Supp. 732, 747-48 (C.D Cal.1975).

World Airways, Inc. v. International Bhd. of Teamsters, Airline Div., 578 F.2d 800, 803 (9th Cir. 1978).

It is apparent, therefore, that the federal policy of furthering safe air travel—as defined both by the courts and Congress—is strong. It is equally apparent, however, that the federal

policy of resolving labor differences through arbitration is also strong. Seen from the perspective of competing federal policies, the issues before the Court may be reframed; that is, the parties' contentions may be consolidated into one central inquiry: which federal policy should take precedence over the other? Stated simply, the central question before the Court is whether the balance between the two federal policies lies sufficiently in favor of air safety to rule that the arbitrator has exceeded his jurisdiction or "acted contrary to public policy" in ordering Morrison's reinstatement. To resolve this question, the degree of interference with the federal interest in air safety must be weighed against the potential for harm that judicial review in this instance poses to the federal policy favoring arbitration.

B. *Balancing the Interests*

In two important respects the arbitration award at issue here does not interfere with policy concerns that have formed the bedrock of the federal policy favoring arbitration. First, the arbitration award does not deal solely with matters involving the interpretation and application of the collective bargaining agreement. Northwest's rules and regulations on the use of alcohol are contained in the Northwest Airlines Manual. *See* PX 8. There is no dispute as to what the rules require. The Manual expressly states that violation of the 24-hour rule shall constitute just cause for discharge. *Id.* at 6-8. The Manual also provides for preferential treatment for alcoholic pilots who voluntarily come forward without violating the 24-hour rule. The collective bargaining agreement makes no mention of the Company's policy on alcohol use. In ruling that Morrison should be reinstated even though he concededly fell within a category for which—under the Manual rules—discharge was justified, the Board patently attempted to apply and interpret a rule whose meaning was not in dispute and which was not included in the collective bargaining agreement.

Section 21(D) of the collective bargaining agreement provides that the Board shall have jurisdiction "over disputes between any employee . . . and the Company growing out of grievances or out of interpretation or application of any of the terms of the . . . Agreement." JX 1 at 68-69. One could argue

that the application of the 24-hour rule to Morrison's particular situation constitutes a dispute "growing out of [a] grievance[ ]," *id.* at 68, and thus—to the extent discussed by the Board in its order—amounts to an "interpretation" or "application" of the collective bargaining agreement itself. This argument, however, is strained and unpersuasive. Clearly, the Board's Order is, in one sense, "related" to the grievance filed by Morrison. Yet the subject of the grievance is a matter about which the collective bargaining agreement is silent. The Board's Order is not limited to an examination of the facts forming the basis for the dismissal. Rather, it challenges the Company's own rules on alcohol use. The *effect* of the Board's Order is to deny Northwest's right to enforce its own carefully articulated alcohol use rules respecting 24-hour rule violators, rules made well known to those in its employ. This fact alone demonstrates that taken to its extreme—without regard to *effect*—the logic of the "grievance" argument would require that any matter—even one expressly delegated to the Company by law—fall within the Board's jurisdiction provided it were somehow "related" or "connected" to the reason for dismissal and the subsequent grievance. This would be an unrealistic result.

This is not to say that a safety-related matter may never be the subject of a Board's order. Were Northwest's rules on alcohol to be incorporated in the collective bargaining agreement, for example, an order applying those rules would clearly "draw its essence" from the agreement and pose no jurisdictional problems. *See e.g., Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 375, 94 S.Ct. 635. Such, however, is clearly not the situation here. *Cf. Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977) (arbitrator obligated to conclude "just cause" for dismissal existed where bargaining agreement expressly stated that a specific form of misconduct justified discharge and arbitrator found employee had committed that form of misconduct); *International Ass'n of Machinists v. San Diego Marine Constr. Corp.,* 620 F.2d 736, 738 (9th Cir. 1980) (arbitrator's decision to reinstate employee upheld where collective bargaining agreement did not expressly define employee's misconduct as misconduct constituting just cause for dismissal).

In short, judicial intervention in this instance need not interfere with the parties' contractual arrangement because no specific agreement was reached to submit safety matters to arbitration. To the extent that the Board's decision strays from a strict "interpretation and application" of the collective bargaining agreement, the award cannot be said to encroach upon the traditional respect federal arbitration policy affords private contractual agreements.

There is a second reason why this award does not trigger the same policy concerns that in other contexts have required judicial deference. Most arbitration disputes involve only two parties, both of whom have voluntarily consented to submit their claims to an arbitrator and have agreed to abide by the result. The award at issue here, however, concerns a third party—the air travelling public. That constituency is not a party to the collective bargaining agreement, has not participated in the selection of the arbitrator or arbitration board, and has not voluntarily consented to abide by the decision reached. Clearly, the import and relevance of a federal policy designed to preserve the contractual arrangement entered into by the two parties to the collective bargaining agreement lessens when a non-consenting third party becomes involved. The danger posed to that third party alone may justify judicial intervention. *See World Airways*, 578 F.2d at 803 n. 8 (distinguishing the holding in *Gateway Coal*, 414 U.S. 368, 94 S.Ct. 629, that safety matters are a valid issue for arbitration, on the grounds that there the dispute involved the safety of coal miners subject to the collective bargaining agreement, while the arbitration decision in *World Airways* affected safety of the travelling public, a constituency not a party to the agreement); *Johns-Manville Sales v. International Ass'n of Machinists*, 621 F.2d 756, 759 (5th Cir. 1980) (upholding enforcement of an arbitration award permitting smoking in an asbestos plant workplace in part on the grounds that smoking, unlike air travel, "is principally a threat to the smoker . . . who willingly courts [the danger]" and does not create a "serious potential danger to the health or lives of third persons [such as] aircraft passengers.").

While the foregoing indicates that review of the Board's Order need not interfere unduly with the federal policy favoring

arbitration, the same cannot be said about the effect of the Order on the "strong federal policy in ensuring the safety of air travel." *World Airways*, 578 F.2d at 803.

ALPA is undoubtedly correct when it asserts that nothing in the text of the Federal Aviation Act expressly states that safety is a matter committed "*exclusively*" to air carriers. As noted above, the fact that the air carrier is "to perform [its] services with the highest possible degree of safety," 49 U.S.C. § 1421(b), does not mean that an arbitrator is necessarily precluded from ruling on a safety-related matter. *See Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361; *Gateway Coal Co.*, 414 U.S. at 375, 94 S.Ct. at 635. The more difficult question, however, arises in a situation similar to the one here where the safety rules are not part and parcel of the collective bargaining agreement. Although the Board purports to have issued a decision that affects only the penalty given to Morrison and not the underlying rule, the fact remains that the Order directly interferes with the implementation of certain carefully considered safety policies.

Northwest's policy on alcohol use is premised on three assumptions. First, Northwest reasons that 24-hour rule violators are less likely than non-violators to possess the quality of judgment that is desirable in a pilot. Second, Northwest takes the position that alcoholism is treatable. Third, Northwest assumes that by proffering the possibility of reinstatement—after rehabilitation—to non-violators who come forward voluntarily, alcoholism among Northwest pilots will be reduced. Taken together, these assumptions create a reasonable, rational policy on alcohol use that distinguishes 24-hour rule violators and non-violators. These rules are clearly set out in the Northwest Airline Manual and, as noted above, at no point did either party agree to place these rules in the collective bargaining agreement, or agree to delegate authority over interpretation or alteration of the rules to an arbitrator.

On its face the Board's Order appears innocuous. The Board terms its own action a "reduction of penalty", Maj. Opin. at 42, and carefully avoids challenging the validity of Northwest's safety rules. The *effect* of the order, however, is quite

different. Northwest's 24-hour rule—and the penalty of discharge that accompanies it—has nothing to do with the seriousness of a pilot's alcoholic history or his ability to overcome the disease. Rather, the rule is based on Northwest's conclusion that alcoholic pilots with the strength of character to admit voluntarily their handicap without violating the 24-hour rule are better suited to fly commercial airliners after rehabilitation than those who fly while under the influence of alcohol. The Board's decision, therefore, simply cannot be interpreted as a straightforward application of Northwest's policy on alcohol use. To the contrary, the decision transforms the policy by ignoring the stated purpose of one rule and misapplying the rationale from another. By concluding that Morrison is entitled to conditional reinstatement, the Board has, in essence, rewritten Northwest's policy on 24-hour rule violators to permit a special exception for those ex-alcoholic 24-hour violators who present evidence of recovery and rehabilitation. Stated differently, the Board has created a hybrid rule for "rehabilitated" 24-hour rule violators.

Much of ALPA's Memorandum in Support of its Motion for Summary Judgment is directed at the merits of Northwest's policy choice. ALPA makes much of the fact that in recent years rehabilitation programs have proven highly successful in treating alcoholic pilots and returning them to work. ALPA places considerable weight on affidavits of medical experts testifying to the success of Morrison's treatment program and the prospects he holds for a successful future if returned to the job. All of these facts, while not unimportant in certain respects, are not relevant to the issues at stake here. Under the terms of the collective bargaining agreement, the Board has no authority to rewrite Northwest's safety rules, or to set new policy. For the purposes of this dispute, all that matters is that Northwest promulgated a clear, concise and rational rule, and the Board chose not to enforce it.[10] The fact that ALPA seeks to implement what it considers a "*safer* air policy" does not

[10] Despite ALPA's assertions, Northwest's policy is not inherently unreasonable. As a practical matter, rehabilitation in an alcohol treatment program may not improve a pilot's judgment. Thus, if the reason for Morrison's

(footnote continues)

justify the degree of interference on Northwest's policies nor remedy the jurisdictional problems with the Board's Order.

The foregoing decision should not be read as a blanket proscription of System Board involvement in safety-related matters. If safety rules are listed as a legitimate subject for arbitration under the collective bargaining agreement, or if the rules are clear, judicial review might well not be permissible. Similarly, were the dispute limited to a determination of the facts underlying an alleged rule violation, exercise of jurisdiction by the Board might be proper. *See Mistletoe Express Service,* 566 F.2d 692 (upholding arbitrator's decision to dismiss on grounds that arbitrator found that employee had committed the proscribed form of misconduct).

But where, as here, a clearly defined safety regulation or policy is rewritten without express authorization under the collective bargaining agreement, the Board's decision extends too far. Under these circumstances, the arbitration Board has exceeded its jurisdiction not because the Company retains *exclusive* jurisdiction over safety matters under the FAA, but

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dismissal was his decision to crew the plane while intoxicated, subsequent treatment for alcoholism will not necessarily remedy the recklessness, and incredible disregard for his passengers' safety that he demonstrated in co-piloting the plane. Indeed, Mr. Morrison had asserted that he had known for a long time that he was probably an alcoholic yet elected to not treat his illness.

ALPA, and the Board, of course, would respond that Morrison's actions at the time were somehow involuntary--the "product" of the disease of alcoholism. Initially, this argument seems unpersuasive. Surely it is one thing to feel a compulsion to reach for alcoholic liquors and another to feel the same compulsion to reach for the controls of a plane while under the influence of intoxicating beverages. Moreover, numerous admitted alcoholic pilots have demonstrated the judgment to come forward *without* violating the rule against drinking and flying. The existence of Northwest's own "bifurcated" policy on alcohol use is testimony to that fact.

Medical opinion on this point, however, is divided. Much research continues to be done in the area of alcoholism and voluntary conduct. Under the circumstances it was not unreasonable for Northwest to conclude by way of its 24-hour rule that character defects/judgments exhibited at the time of the violation are unlikely to be remedied by subsequent treatment for alcoholism.

because the Board's decision substantially interferes with air safety responsibilities entrusted to Northwest without encroaching unduly on concerns underlying federal arbitration policy.

This interference with Northwest's safety obligations takes on an even more serious cast when viewed in terms of a traditional "public policy" analysis. No citation of authority is required to establish that intoxication and piloting—when performed together or in close succession—does not serve the public interest. In the words of one circuit court:

> [a]lcohol impairs a person's coordination, and inhibits his ability to reason rationally. Ingestion of alcohol slows the reflexes. It induces drowsiness. It slows response time to external stimuli. It dulls the senses. In recognition of alcohol's undisputedly debilitating characteristics, every state in the union prohibits driving while under its influence.

Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122, 124 (5th Cir. 1983). Nowhere are reflexes and "the ability to reason [quickly and] rationally" more important than in the cockpit of a jet liner. A pilot or a co-pilot may have but seconds to make a decision or execute a maneuver that will determine the fate of hundreds of passengers. No one can "overlook the horrible toll in human life that air crashes can take." *World Airways*, 578 F.2d at 804.

The public policy against the use of alcohol and flying is "well-defined and dominant." *See Amalgamated Meat Cutters*, 712 F.2d at 124 (setting forth standard to be used in determining what constitutes a public policy violation). C.F.R. regulations promulgated pursuant to the FAA clearly reflect a national policy against the use of alcohol or drugs by airline crew members. *See* 14 C.F.R. § 12(4)(i)(ii); 14 C.F.R. § 91.11(a). *Cf. Johns Manville Sales*, 621 F.2d at 759 (arbitration award permitting smoking at workplace upheld as not contrary to public policy because decision did not offend a national policy—as reflected in agency rules or regulations—against smoking in asbestos plants); *Amalgamated Meat Cutters*, 712 F.2d at 124-25 (citing provisions of the Federal Motor Carrier Safety Regulations as evidence of the national policy against drinking and driving). Thus, to the

extent that the reinstatement order interferes with the Company's safety obligations under the FAA, the Board's award is contrary to public policy.

This last point is significant not simply because it underscores the seriousness of the intrusion on federal air safety policy, but also because it provides an added, independent reason why the award should be held unenforceable. *See Amalgamated Meat Cutters,* 712 F.2d at 124 ("[e]nforcement of an aribtration award should be denied if . . . the award . . . would violate public policy"; and "public policy necessary to prevent enforcement . . . must be 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents" ' "); *Johns-Manville Sales,* 621 F.2d at 757.

ALPA argues that the "dominant public policy" should be defined not just in terms of 24- or 8-hour rules, but also in terms of "deterrence." Rehabilitating and reinstating pilots with a history of alcoholism, ALPA insists, should be viewed as consistent with public policy because it serves to encourage alcoholic pilots who might otherwise have kept their "illness" a secret to come forward in search of help.

While this approach to the airline industry's alcoholism problem may have proven both workable and effective, it cannot be overlooked that national policy—when "ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests' "—incorporates both the concept of deterrence (through rehabilitation and reinstatement), and that of incapacitation (dismissal for violation of a 24- or 8-hour rule). *Amalgamated Meat Cutters,* 712 F.2d at 124. It is impossible to conclude, therefore, that the Board's interference with Northwest's enforcement of its 24-hour rule was entirely consistent with public policy.

IV. *Summary*

Weighing the concerns that underlie the federal policies placed in issue by the Board's order, it is apparent that in this instance the Board has exceeded its jurisdiction and unduly interfered with the federal interest in air safety. Although the

FAA does not delegate safety matters exclusively to airline management, an air carrier bears considerable responsibility for ensuring that services are performed with the "highest possible degree of safety." 49 U.S.C. § 1421(b). Here the Board's decision significantly hampers Northwest's ability to fulfill its responsibility while simultaneously failing to promote traditional policy concerns that underlie the competing federal interest favoring arbitration.

The situation at issue here is unique in several respects. First, unlike a traditional arbitration dispute, the Board's decision does not purport to resolve a question of interpretation arising directly from the terms of the collective bargaining agreement. The subject matter of the dispute concerns the application of a Company rule that—on its face—is patently clear. If the dispute can be said to arise from the collective bargaining agreement at all it is only because the matter is arguably related to a "grievance." One must strain the holding of *Enterprise Wheel*, however, to conclude that this link is sufficient to find that the award "draw[s] its essence from the labor agreement." At best, the subject matter of the dispute sits only on the outer perimeter of the arbitrator's jurisdiction.

Second, the effect of the order is not limited to two parties who have contracted willingly to accept the arbitrator's decision. Involved here is a critical third party—the air travelling public—whose interest requires protection and who has not consented to have its interests arbitrated by the Board. These factors—the presence of a third party and the lack of a clear connection between the subject matter of the dispute and the terms of the collective bargaining agreement remove this case from the category of traditional arbitration disputes for which the policy of judicial deference was designed. In short, judicial deference under these circumstances will not promote the rationale behind the federal policy favoring arbitration; and conversely, failing to defer need not harm the federal interest in arbitration.

The award's effect on the federal interest in air safety, however, is entirely different. The Board's decision significantly encroaches on Northwest's responsibilities to the air travelling public. Stated simply, the decision requires Northwest to

reinstate a pilot it believes is unfit for the weighty responsibilities of the position.[11] The Order imposes this result on the Company even the though the majority opinion concedes that the facts surrounding the discharge—as alleged by Northwest—are accurate, and even though no direct challenge is made either to Nothwest's authority to promulgate rules that reflect its policy on alcohol use, or to the meaning of the specific Northwest Airlines Manual rule used to discharge Morrison. Under the guise of a debate over application of policy and rules, the Board's decision substitutes its own policy for Northwest's.

When the degree of interference with air safety interests is weighed against the minimal potential for harm that judicial review poses in this instance to the federal policy favoring arbitration, it is clear that on balance the Board has unjustifiably exceeded its jurisdiction. Under the terms of the Railway Labor Act, therefore, reversal is required. 45 U.S.C. § 153 First (q) (exception (2): "failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction"); *see Union Pac. R.R. Co.*, 439 U.S. at 93, 99 S.Ct. at 401.

Confronted with strong, conflicting federal policies, it is frequently impossible to conclude with precision which interest must prevail. Here, as in other cases, the balancing of benefits and harms required to determine if an arbitration board has exceeded its jurisdiction is an inexact science—one that does not render "yes" or "no" answers. Yet, in this instance, any uncertainty in the relative weight to be assigned the competing sides of the debate is eliminated by the presence of unique, albeit exigent, circumstances that must be considered in the overall calculus. One need not be an aviation expert to appreciate the enormity of a pilot's responsibility, and the seriousness of the consequences should that responsibility not be met. Unlike many other professions, piloting leaves little margin for error. It is for this reason that both an employer and

[11] The decision requires reinstatement provided certain conditions are met, but all of those conditions rest outside of Northwest's control. The fact remains that under the terms of the order, Morrison can be reinstated without Northwest's concurrence or consent.

the air-travelling public have a right to expect, and rely on, a high level of trust and commitment from those who are employed to fly passenger aircraft. A court must tread with exceeding caution before *requiring* an air carrier to reinstate a pilot who has breached that trust.

V. *Conclusion*

For the reasons set forth above, summary judgment shall be granted in favor of plaintiff Northwest Airlines. The Adjustment Board's decision of October 29, 1984, shall be reversed. A separate judgment accompanies this Memorandum Opinion and Order. All additional outstanding motions are denied as moot.

Appendix C

SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration
BETWEEN

NORTHWEST AIRLINES, INC.
and

AIR LINE PILOTS ASSOCIATION
(Grievance 405-82, Docket 82-23; Larry Morrison)

AWARD

The undersigned, acting as the System Board of Adjustment and having duly heard the proofs and allegations of the Parties, therefore renders the following

AWARD

The discharge of First Officer Larry Morrison on August 6, 1982 was without just cause.

He shall be offered reinstatement without back pay, fringe benefits or accumulation of longevity for pay purposes at such time as the Federal Air Surgeon certifies that he meets the standards of Section 67.13(d)(1)(i)(c) of the Federal Air Regulations and is thus capable of performing his duties as an airman for the Company without monitoring.

/s/
George Nicolau, Chairman

October 29, 1984

/s/
Randall B. Ohm,
NWA Member
(I dissent)

/s/
Arnold C. Calvert,
ALPA Member
(I concur)

SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration
BETWEEN

NORTHWEST AIRLINES, INC.
and

AIR LINE PILOTS ASSOCIATION
(Grievance 405-82, Docket 82-23; Larry Morrison)

OPINION of the CHAIRMAN

System Board of Adjustment

George Nicolau, Chairman
Randall B. Ohm, NWA Member
Arnold C. Calvert, ALPA Member

APPEARANCES:

For NWA:

Michael I. Fahey, Esq., Director, Labor Relations
Donald F. Nelson, General Manager, Flight Operations

For ALPA:

Kenneth B. Cooper, Esq.
Owen J. Dratler, Esq.
Larry Morrison, Grievant

The issue in this case is whether the Company's discharge of First Officer Larry Morrison on August 6, 1982 was for just cause, and if not, what the appropriate remedy should be.

Hearings on this issue were held at the Company's headquarters in Minneapolis on December 1 & 2, 1983, at which time the Parties, after attesting that the matter was properly before the Board, were afforded full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. A transcript, consisting of 223 pages was taken and supplied to the Board. Thereafter, on March 17, 1984, both Parties submitted post hearing memoranda. At the same time the Association moved to reopen the hearing for the receipt of additional post-discharge documentary evidence. Subsequently, the Board met in executive session on May 31, 1984 in New York City and on August 28th in St. Louis, Missouri to consider that request and the case in toto.

The Background

The Company's 24-hour rule, which has been in existence for many years, reads as follows:

"G. **Intoxicating Beverages, Drugs and Narcotics**

1. Crew Members

a. The use of alcoholic beverages by crew members while in uniform, on duty, on call or during the 24-hour period immediately preceding departure time on any flight to which assigned as a crew member, is prohibited . . .

f. **Violation of any of the above rules shall constitute sufficient cause for discharge."**

(NWA Exhibit 3A)

On Friday, July 30, 1982, Morrison, who had been with the Company 16 years and had an unblemished disciplinary record, was assigned as First Officer on Flight 125 from Minneapolis to Las Vegas, with intermediate stops in Spokane, Seattle and San Francisco, the flight arriving in Las Vegas at approximately 7 PM. His next departure, Flight 81 in a reverse of this pattern, was scheduled for 7:40 AM, Sunday, August 1st, a lay-over of some 30 hours.

On his arrival in Las Vegas, Morrison had a sandwich and a beer, then bought two pints of vodka (II-9).[1] At around

[1] The transcript is in two volumes. Page references will be (I-) and (II-).

midnight, he drank approximately ¾ of the first bottle in about 3 minutes, turning the bottle up to do so. He then went to sleep. When he awakened on Saturday morning at approximately 8 AM (this is now within 24 hours of his next scheduled departure), he finished off the bottle in the same manner. He then went back to sleep until about 2:30 in the afternoon. Morrison then went down to poolside, where he ordered and drank two double vodkas. That evening, at approximately 6 PM, he went to an Italian restaurant, ate a pizza and drank a litre carafe of wine. At approximately 10 PM, in his hotel room, he chug-a-lugged ¾ of the second pint of vodka and went to sleep. Sometime in the early morning, around 4 AM, he finished the second bottle (II-10 & 11). All of this drinking was alone.

About an hour later, Morrison became ill, vomiting and suffering diarrhea. When he did not show up in the hotel lobby for the crew bus departure at around 6:30, he was called first by the Second Officer and then by the pilot, Captain Dill. Though there is some discrepancy as to what was said, both agreed that at some point Morrison said he was ill and should be replaced and that Dill called back a few minutes later saying that there was no one "legal" who could take his place. This would have meant cancellation of the flight if Morrison was not on it. Morrison stated that when confronted with this, he told Dill that he would go if Dill would fly the legs to San Francisco and Seattle and if he, Morrison, could be replaced at the latter. Dill's statement (NWA Exhibit 13), which was taken after Morrison had been terminated, was to the effect that Morrison said he was feeling better and could make the flight, only asking that he be replaced when they arrived in Seattle.

In any event, Morrison came down, met Dill and got into a cab with him for the ride to the airport. To Dill, Morrison appeared perfectly normal, Dill not noticing anything untoward except that Morrison might have been a little pale. According to Dill, he also mentioned something about "bad food" (NWA Exhibit 13, pp. 11-14, 17). Morrison flew as First Officer, doing what Dill characterized as "an excellent job" (NWA Exhibit 13, p. 15).

Before the flight left, the General Manager for Flight Operations, Donald Nelson, had been alerted by Las Vegas ground personnel that there had been some difficulty getting Morrison down for the crew pick-up and that he "didn't look very well." Suspicious because of that and because Morrison was chewing tobacco, "which in itself seemed somewhat unusual early in the morning," Nelson stated that he tried to stop the flight but was unsuccessful.[2] Thereafter, he gave orders for Morrison to be replaced in San Francisco and be given a blood test (I-14 & 15).

After the flight arrived in San Francisco, Nelson talked to Morrison by phone, told him that he was suspicious that he had been drinking, and directed him to submit to the blood test. Morrison agreed, but hesitated after talking to an ALPA representative and then agreed again. The test, taken at 10:46 AM, showed that Morrison had a .13% blood alcohol level by weight and volume (NWA Exhibit 4B). (In California, .10% establishes a presumption of intoxication.)

Later that day, Morrison deadheaded to Seattle and, on August 6th, was present in Minneapolis for an investigation by Company officials. At that meeting, a transcript of which is in evidence as NWA Exhibit 5, Morrison, who was accompanied by an ALPA representative, recounted the drinking sequence outlined above. He also stated that he did not become ill from the alcohol, but from food poisoning or a virus, and went to doctors in Seattle on the 2nd or 3rd for medication. (The doctors' letter is in evidence as ALPA Exhibit 11).

Morrison also told Company officials that he had been drinking straight from the bottle for some 10 years, sometimes consuming a pint of vodka on the 50-mile drive home, that he would drink heavily on the first days of the 3-day Orient layovers he asked for and preferred, that he had suspicions he might be an alcoholic, but never sought treatment because he knew he would be "canned." When asked if he was as "sharp" on the flight as he would have been without alcohol in his blood, Morrison replied that that was "difficult to answer," but that he knew he had a high tolerance for alcohol "from past

[2] As attested to by Dill, Morrison, at least in 1982, chewed tobacco almost constantly (NWA Exhibit 13, pp. 16 & 17).

experience," saying that if he had drunk a pint an hour before the meeting, no one would have been able to detect from his behavior that he had been drinking (NWA Exhibit 5, pp. 19 & 20). Morrison also stated that he probably had violated the 24-hour rule before but could not be specific as to a particular time (*ibid.*, 22 & 23) and that this was the first time he had ever consumed alcohol so close to departure. In explanation, he said that he had some "personal problems," that his father in Wyoming was "very ill," that his wife was having kidney problems which sometimes laid her out three days at a time and that since they had three children, ages 2, 3 and 4, these "worries kind of got to [him]" (*ibid.*, p. 10).

At the end of the meeting, Pat Brennaman, the ALPA representative, suggested that Morrison might be suffering from alcoholism and that consequently this was not "your typical misconduct case" because an alcoholic "can't control his actions in the same way someone else can." He further suggested that the Company send Morrison to someone to determine whether he was an alcoholic, that if he was, the matter should be treated medically saying that "It would be a serious mistake . . . to treat it as a straight misconduct case without investigating whether or not there is an underlying medical problem." When Company officials said that they were under a time limit, Brennaman offered to waive it and the Company then said it would take his suggestion under consideration (*ibid.*, pp. 20-22).

Later that same day, Nelson, who was not at the investigation but conferred with officials who were, decided that Morrison should be discharged. The termination notice, signed by Director of Flying H. L. Vierter and dated August 6, 1982 but effective 9:50 AM, August 1st, states:

> "Your dismissal is the result of your violation of Company rules and regulations prohibiting the consumption of alcoholic beverages within 24 hours of flight duty. On August 1, 1982, you were assigned to be an operating crew member of Flight 81 LAS-SFO. During the 24-hour period preceding the flight you consumed alcoholic beverages. This constituted just cause for your immediate discharge. Your misconduct was further aggravated in that you consumed

sufficient quantities of alcohol so as to be under the influence of alcohol during the flight thereby jeopardizing the safety of the flight."

(ALPA Exhibit 1)

The Parties entered into fact stipulations relating to some of the above events. That Exhibit reads:

"FACT STIPULATIONS

(1) Larry Morrison admits consuming alcohol in violation of the Company's '24-hour rule' on July 31, 1982 and the morning of August 1, 1982.

(2) Larry Morrison admits serving as a crew member on Flight 81 on August 1, 1982 from LAS to SFO while under the influence of alcohol.

(3) Larry Morrison has not presented a valid First Class Medical Certificate since August 1, 1982, and is not claiming any back pay from that date to the present.

(4) In the State of California, the legal level of blood alcohol establishing a presumption of intoxication is .10% (W/V) or greater. At 10:45 AM on August 1, 1982, Larry Morrison's blood alcohol content was .13% (W/V).

(5) Flight 81 was scheduled to depart LAS on August 1, 1982 at 7:40 AM. It actually departed LAS at 8 AM due to crew delay. Flight 81 was scheduled to depart SFO to SEA at 9:30 AM. It actually departed at 10:05 AM."

(Joint Exhibit 3)

ALPA's basic position in this proceeding is that Morrison is an alcoholic and that his termination was without just cause because his admitted rule violation was the unavoidable consequence of that progressive disease. In support of that position, ALPA offered post-discharge evidence as to the diagnosis of the disease in Morrison's case, the nature of the illness, and Morrison's progress in rehabilitation. The Company objected to such evidence on the ground of relevancy, stating that its action should be judged solely on the basis of the facts known to it on August 6th.

The Chairman is of the opinion that said evidence should be admitted.[3] That opinion is grounded on the belief that alcoholism is an illness and that, as another Board said in *McMurray*,[4] "the possibility of recovery from an illness is an element which should be considered in determining the appropriate remedy."

Morrison, a resident of the State of Washington, voluntarily entered the Alcohol Treatment Program at Valley General Hospital in Monroe, Washington on August 7, 1982, the day after Captain Nelson decided to discharge him. He was encouraged to do so by Brennaman and Charles Buckland, a member of ALPA's Human Intervention and Motivation Study Committee (II-17 & 18). At Valley General, he was diagnosed as having a chemical dependency on alcohol. After that diagnosis, Morrison, who told the evaluators that he was coming "in an effort to get his job back," entered the 28-day treatment program. In the beginning, he had difficulty accepting his alcoholism, saying that for him it was the "toughest thing" to admit because his conception of an alcoholic was someone lying in the gutter in terrible physical condition and without assets, but finally realized that, though he had assets, he was "spiritually, morally bankrupt," "couldn't handle alcohol" and "no longer had any control over [his] life" (II-20 & 21). After achieving acceptance of his condition, an acknowledged critical stage in recovery (see ALPA Exhibit 5, pp. 88-92), Morrison completed the 28-day program and was discharged on September 4, 1982.

Since that time he has participated in an extensive aftercare program, including meetings 3 or 4 times a week at Alcoholics Anonymous, meetings at Birds of a Feather, a Seattle-based group of recovering or recovered alcoholics who are airmen, and weekly sessions with Terry Seaholm, a counsellor at the Southwest Community Alcohol Center. He has also met periodically with Dr. John Buehler, a psychiatrist, and his medical sponsor, Dr. Robert Riordan of Berkely, California, a

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[3] As noted below, this ruling also applies to ALPA's motion to open the Record.

[4] *NWA and ALPA* (McMurray), March 27, 1984, Arvid Anderson, Chairman.

specialist in aviation medicine and an FAA-designated Senior Aviation Medical Examiner. (The treatment records are in evidence as ALPA Exhibit 10.)

Morrison has not had a drink since the August 1, 1982 episode in Las Vegas and, on January 10, 1984, the FAA Federal Air Surgeon declared him "eligible for special issuance of a First Class Airman Medical Certificate under Section 67.19 of the Federal Air Regulations." That "six months" eligibility was conditioned on successful completion of a physical examination. Continued certification thereafter was conditioned on the receipt of monthly reports from Northwest Airlines and ALPA attesting to his continued abstinence from alcohol, quarterly progress reports from Seaholm, and yearly reports from Dr. Buehler. (The FAA recognizes alcoholism as an illness, but, until a few years ago, would not reissue certificates to pilots in Morrison's situation except through its "exemption" process which requires, at the minimum, abstinence of two years. Under the "special issuance" procedure and its monitoring system, reissuance can come earlier. See ALPA Exhibits 8 & 9).

Though Morrison's Pilot and Flight Engineer Certificates were returned to him pending the physical, the Company, which has consistently refused to participate in the monitoring required under the FAA "special issuance" program, protested the FAA's January 10, 1984 action and asked that his eligibility be reconsidered and revoked. As of this date, the FAA has not acted on that request.

Dr. Riordan testified on Morrison's behalf in this proceeding, as did Dr. George Mann, Director of the Adult Chemical Dependency Programs at St. Mary's Rehabilitation Center in Minneapolis. ALPA also introduced into evidence Dr. Mann's book, *Recovery of Reality,* and *I'll Quit Tomorrow* by Dr. Vernon E. Johnson.

Both Dr. Mann and Dr. Riordan accepted the FAA's definition of alcoholism as medically valid. That definition reads:

> "Alcoholism, as currently defined, is a diagnosable disease in those whose alcohol intake is great enough to damage physical health, or personal or social

functioning (which includes occupational functioning), or when it has become a prerequisite to normal functioning."

(ALPA Exhibit 8)

Dr. Mann testified that, though the etiology of alcoholism has only recently been understood, there is almost universal medical opinion that alcoholism is an illness and one that is primary, chronic, progressive and, if not arrested, fatal; that, as it increases in severity, the alcoholic loses more and more control over the amount, time and place of alcohol consumption until drinking itself becomes his or her primary consideration to the exclusion of family, job, social life and physical well being; and that this increased severity is accompanied by heightened denials and rigid defense mechanisms along with recognizable symptoms and signs, such as rationalizing, minimizing, changing tolerance, attempts to stop drinking, increased drinking at inappropriate times and places, surreptitious attempts to protect the supply, driving while intoxicated arrests and convictions, and black outs, i.e., episodes of amnesia (I-40-46).[5]

Dr. Mann also testified that alcoholism is a treatable illness, that treatment requires acceptance of the illness, behavior modification, education as to the psychological and physiological effects of alcohol, the introduction of "more productive coping mechanisms" to deal with personal problems, continued after-care and the ongoing support of "help" groups, family and friends (I-47 & 48). He also stated that the national recovery rate for those alcoholics entering a well run program is between 70% to 80%, but that in his personal experience the recovery rate for pilots, who, as a group, are highly motivated, is significantly above the general population, running to 90% (I-48 & 49).

Dr. Riordan, who, as Morrison's medical sponsor, has coordinated the reports and efforts necessary for his "special issuance" application, first saw Morrison on December 2, 1982.

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[5] A list of 22 such symptoms and signs in increasing order of severity appear in Dr. Mann's book (ALPA Exhibit 6) on pp. 65-69, with black outs listed as the most severe.

He testified that his review of the records of treatment and his interview with Morrison led him to the conclusion on Morrison's continued and increasing drinking as his family, social and business life disintegrated, his disassociation from "his spiritual considerations in life," "the periods of amnesia during which he had no recall," the circumstances of his 24-hour rule violation on August 1st, and his ability to function at all on that date since the blood test indicated an exceptional tolerance for alcohol found only in alcoholics (I-99 & 100, 110 & 111, and 130-132).

Dr. Mann, who examined Morrison approximately a year later but with access to the same medical records, agreed, saying that the "tremendous tolerance" exhibited by Morrison on August 1, 1982, which could only have been built up over time, was a "prime factor" for a determination of alcoholism (I-78).

Both doctors also testified that Morrison has acted responsibly with respect to his alcoholism since August 1st, Dr. Mann saying:

> "He has been continuously abstinent since the day he entered into treatment, he participated fully and cooperatively with the treatment process, he has followed diligently and religiously the recommendations of his after-care plan, he has been responsible, he has worked on his ranch, he has been successful in his private life, he has done all of the appropriate things that he would need to do to ensure his recovery from alcoholism." (I-56)

Dr. Riordan, for his part, stated that these life style changes—the improvement in his family relationships, his improved work productivity on his ranch, the changes in his attitude and appearence—coupled with his total abstinence demonstrated that Morrison was "in control now" and were "characteristics of the recovery process" (I-101).

Morrison, his wife, a former NWA Flight Attendant, who happen to be allergic to alcohol, and Howard Schwend, a

fellow NWA pilot, all testified to Morrison's history. That testimony, which covers a period from approximately 1970 onward, reveals a host of alcoholism's signs and symptoms—increased drinking and tolerance, the choosing of flight schedules and patterns so as to create long lay-over "drinking" time, unsuccessful interventions by his wife and friends, the abandonment of prior civic and political involvements, unsuccessful attempts to stop, the abandonment of prior religious ties, increased isolation and increasing irresponsibility to his wife, his children and his business (as his problem became more advanced, the gross income of the ranch dropped from $700,000 to $40,000), rationalization, the casting of blame onto others, black-out episodes involving his children and his car, difficulties in concentration and in assimilating material which resulted in check ride problems, and, in one instance, the failure to upgrade, and solitary and hidden drinking, including staying away from friends and the hiding of pint bottles in the car and the barn, finally reaching the point where drinking was the "biggest thing," taking priority over everything else in his life (II-5 & 6, 12-15, 22-25, 27 & 28, 35, 37 & 38, 50, 52-57, 60-65 and 70-73).

Mrs. Morrison also testified that since Morrison began the program of abstinence he has become "entirely a different person, that his physical condition is greatly improved, that he is now responsive and responsible to her and the children, that he has turned the ranch around, gaining "the Grand Champion at the Stock Show" for a Black Angus, that he now takes "a lot of pride in everything that he does," that he helps others trying to cope with alcoholism and that he "can now do what he wants to do" and is "really on the right track" (II-65 & 66).

Morrison testified that he had thought he could control his drinking which he then believed was only a "problem" and that he did not previously come forward voluntarily because he did not realize how bad it was and because he understood that no NWA airman who did ever went back to flying again (II-42-49). Mrs. Morrison, who left the Company in 1977, echoed this view, saying it was her understanding he would have been fired on the spot if he had done so (II-68). Schwend, in turn, said

that when he attempted to help Morrison in 1979, it would have been "professional suicide" to tell the Company of Morrison's difficulty because "more than likely it would mean [his] job" (II-54).

As it was, all three were mistaken about the impossibility of pilots diagnosed as alcoholics returning to the line. As the opinion in *McMurray* reveals, on p. 7, six pilots who came forward before being detected in a violation of the 24-hour rule had resumed flying under the 2-year exemption procedure. However, neither Schwend nor Morrison, when asked, were aware of either the names or the circumstances and it is evident from Captain Nelson's testimony (II-78 & 79) that the Company, for public relations reasons and perhaps other reasons as well, did not make any of this known to the pilot population generally.

The Company's policy in August 1982, first enunciated on April 1, 1980 though not published even in outline form to the pilots until December 1982, four months after Morrison's termination, (II-74) states:

"SUBJECT—POLICY ON USE OF ALCOHOL, DRUGS AND/OR NARCOTICS AND ALCOHOLISM OR OTHER CHEMICAL DEPENDENCY

A. GENERAL

The Company recognizes that alcoholism and other forms of chemical dependency are treatable conditions and that early detection and treatment may increase the likelihood of successful rehabilitation. This reference codifies long standing Company policies concerning the use of or addiction to alcohol, drugs, and/or narcotics and is to be used by managers in dealing with contract employees under their supervision. As with any Company policy, this policy will be reviewed for effectiveness and is subject to modification at any time.

B. RELATIONSHIP OF POLICY TO OTHER COMPANY RULES

The establishment of this policy in no way diminishes the Company's right and/or authority to discipline or discharge an employee for conduct that would warrant discipline or discharge of an employee who is not chemically dependent. Neither the availability of this policy, nor participation in any rehabilitation program pursuant to such policy, will excuse an employee from obeying all Company rules and regulations, including those pertaining to the use or possession of alcohol, drugs and/or narcotics. An employee's alcoholism or chemical dependency will be no defense to a proven violation of Company rules. . . .

2. Personal Leave of Absence

a. A pilot who does not violate the policy but who has either a clinical diagnosis of alcoholism or chemical dependency or who believes he/she may be an alcoholic or chemically dependent may request and will be granted a personal leave of absence for a reasonable length of time for the purpose of obtaining professional assistance to overcome the desire and need for alcohol, drugs and/or narcotics.

3. Exemptions and Return to Service

a. A pilot who has a history or diagnosis of alcoholism or chemical dependency does not meet the requirements of the Federal Aviation Administration for a medical certificate which is required to permit continued service as a Northwest Airlines pilot unless such pilot obtains an exemption from the disqualification by the Federal Air Surgeon. In order to return to service as a pilot for Northwest Airlines, the pilot must obtain an exemption which is unconditional except to the extent continued professional counselling may be required for a reasonable period of time. An exemption which requires monitoring and certification of the continued abstinence of the pilot from alcohol, drugs and/or narcotics either by the Company or any of its employees or by any other person establishes that the Federal Air Surgeon is not satisfied the pilot has

overcome the desire and need for alcohol, drugs and/or narcotics. Under such circumstances, the pilot is not permitted by the Company to return to flying.

4. Medical Certification and Alternative Employment

a. Northwest's responsibility for the safety of the public not only permits but requires Northwest to make judgments on a reasonable basis as to the qualification and fitness of its pilots. It is Northwest's policy that unless and until the Federal Air Surgeon declares a pilot who has been diagnosed as an alcoholic to be free from the desire and need for alcohol so that monitoring of his/her continued abstinence is not required by any person, such pilot shall not be utilized to fly an aircraft. The same rule applies to pilots who have been diagnosed as chemically dependent. If the Federal Air Surgeon is unable to declare a pilot free from the desire and need for alcohol, drugs and/or narcotics without monitoring within a reasonable period of time after a personal leave commences, that pilot must consider a career change where his/her propensity for the use of alcohol, drugs and/or narcotics will not endanger the lives and property of other persons. Such pilot will be considered for other employment with the Company. Alternative employment inquiries should be directed to the office of the Director of Employment."

(NWA Exhibit 8)

As can be seen, the policy differentiates between those who violate the 24-hour rule and those who do not. For those who come forward before violating the rule (or being detected in such violation), the policy does not mandate "discipline or discharge," but since it does not permit FAA "special issuance" monitoring, it means an unpaid 2-year leave of absence, with the possibility of interim alternative employment.[6]

[6] On July 1, 1983, the Company changed this policy to the extent that it now authorizes full pay and benefits until vacation and sick leave accruals are exhausted. However, those who are under investigation for a rule violation or have a grievance with respect thereto are not eligible for these payments. In all other respects, the policy, including non-monitoring, remains essentially the same (ALPA Exhibit 2).

In commenting on the policy, Dr. Mann testified that, in his opinion, the "imposition of severe penalties, such as discharge, on employees whose misconduct is medically related to their alcoholism," drives alcoholics "underground;" that this is detrimental to the success of any employee assistance program because it tends to delay treatment; and that to "expect responsible drinking behavior in an untreated alcoholic is kind of like asking someone who has a bleeding peptic ulcer to not bleed. . . ." Dr. Mann concluded that there is thus a "rational basis for treating an alcoholic pilot who flys while under the influence or breaks a 24-hour rule differently from a non-alcoholic pilot who engages in that conduct." He further stated that an untreated alcoholic should not get off "scott free," but that an alcoholic, once treated and recovering, is and should be responsible for his behavior. He also stated that what he found "abhorrent" was the "discriminatory" approach to the treatment of medical problems such as heart attacks and alcoholism, granting sick leave for one and not the other, because "firing someone because they are sick is not good medical care" (I-53-55, 63 & 64, 67 & 68, 71-74).

Dr. Riordan similarly did not advocate discharge for the alcoholic rule breaker, but was of the opinion "that some sort of disciplinary action . . . would be appropriate in terms of maintaining the stability of any particular alcoholism program that the company has" and that when he was a medical director for airlines he left the disciplinary action decision to the company's policy makers (I-115 & 116, 121 & 122).

The Contentions of the Parties

In addition to arguing that all testimony concerning Morrison's alcoholism is irrelevant, a matter already ruled upon, the Company's basic position is that its obligation to protect air safety to the highest possible degree is *per se* justification for his discharge when he admittedly violated the 24-hour rule and flew under the influence of alcohol. Citing *Bosari v. FAA*, No. 82-4140 (2nd Cir. 1983) and *Amalgamated Meat Cutters v. Great Western Food Company*, No. 82-1207 (5th Cir. 1983), the Company asserts that any action by the Board other than

sustaining the discharge would violate public policy and be in excess of its jurisdiction.

The Company also argues that prior Awards of this System Board, which it submitted in full, support its discharge decision.

As to ALPA's alcoholism defense, the Company asserts that it had no evidence on August 6, 1982 to support any such conclusion that it had no obligation to "extend its assets and conduct its own medical inquiry into the Grievant's alleged alcoholism when the facts clearly indicated a gross violation of the Company's 24-hour rule," and that, in fairness, the Company can only be judged on the basis of what it knew at the time of discharge.

Even assuming the Company knew Morrison to be an alcoholic, the Company argues that ALPA's defense should be rejected because (1) the NWA/ALPA Contract does not recognize alcoholism as a medical condition entitling an employee to sick leave or medical leave, (2) Morrison's own experts could not agree on whether alcoholism is an excuse for misconduct, (3) alcoholism is not recognized as an excuse for misconduct either by the courts or the general public, and (4) allowing alcoholism to serve as a defense would undermine and effectively eliminate the ability of the Company to strictly and consistently enforce its safety rules pertaining to drugs and alcohol.

Elaborating on the latter point, the Company argues that adoption of a "dual standard" would emasculate the rules. It contends that a pilot with a drinking problem could continue drinking with the realization that he could plead alcoholism and thereby insulate himself from discharge, and that every pilot discharged for a violation of the 24-hour rule would so plead and seek such a diagnosis from those eager to assist him. The Company also argues that those who are not alcoholics could plead disparate treatment under such a dual standard and that all of these factors would effectively undermine what has been a strict enforcement of its rules.

The Company also suggests that it is entirely possible that Morrison was inappropriately diagnosed as an alcoholic but

argues that "the better approach" is to reject entirely the concept of alcoholism as a defense to a 24-hour rule violation.

ALPA, of course, admits Morrison's violations but argues that they were the unavoidable consequence of his alcoholism. It argues, too, that the Company's refusal to consider Morrison's alcoholism when put on notice of the same, its failure to recognize his record of service and its "dormant, incomplete, [and] unpublicized alcoholic rehabilitation policy," which, in ALPA's view, is the cause of alcoholic pilots not coming forward on their own, all combine to make discharge inappropriate. It argues that Morrison was an alcoholic, and that as a consequence he could not control his drinking and therefore did not engage in a volitional act. ALPA notes that the unrebutted evidence proves that Morrison has been completely rehabilitated, with the FAA, the primary guardian of air safety, finding him capable of flying commercially and that in such circumstances his reinstatement is completely appropriate. Though it does not argue for retroactive reinstatement to active duty and compensatory back pay, ALPA asserts that Morrison should be treated retroactively in conformity with the new, July 1, 1983, Northwest policy, which affords sick leave and medical leave, that if qualified, he should be offered suitable employment in the Training Department or some other department and be "paid the same as any other pilot in the department" until such time as he is legally able to return to the line. ALPA concludes that when that time comes he should be permitted to exercise his seniority as any other pilot returning from sick leave.

Discussion and Analysis

In the foregoing section, the Chairman, in recounting the respective positions, has radically condensed the detailed arguments set forth by both Parties in their exhaustive briefs. However, he has carefully considered all those arguments, the testimony, the exhibits (including the texts submitted by ALPA) and the cases offered by each side.

It is clear, of course, that Morrison violated the 24-hour rule on August 1, 1982 and also participated in a flight with sufficient alcohol in his bloodstream to raise a presumption of intoxication in the state where the test was taken.

It is also clear, however, that on that day Morrison was an untreated alcoholic. While the Company argued that he may have been misdiagnosed, it offered no expert testimony in support of that assertion and the unrebutted medical testimony is overwhelmingly to the contrary. Though the lack of DWI arrests and the absence of some of the more overt physical manifestations of alcoholism argue that Morrison was not in the truly advanced stages of that disease, it is evident, when the mosaic of his history is pieced together, that by August 1, 1982 he had crossed the line separating the problem drinker from one inflicted with the illness of alcoholism. No other conclusion can reasonably be drawn. It is similarly clear that his violations were the unavoidable consequence of that disease. Both Dr. Mann and Dr. Riordan testified, without contradiction, that Morrison's uncontrolled drinking and subsequent flying under the presumptive influence were medically related to and the result of his affliction (I-51 & 52, 99 & 100).

Certain other things are clear. First is the fact that the FAA has declared Morrison eligible to fly again under its special issuance procedures (though the Company has asked that that decision be reconsidered), and second, that present Company policy refuses to allow pilots who require monitoring to fly its aircraft.

The Company argues, first, that the fact of Morrison's alcoholism should not even be considered because any form of reinstatement, however conditioned, would be contrary to public policy. It cites both *Bosari* and *Great Western Food* to that effect and notes that the former has been denied *certiorari* by the Supreme Court at 103 S.Ct. 115, and the latter denied rehearing by the 5th Circuit at 717 F.2d 1399.

In *Bosari*, the FAA dismissed an Air Traffic Controller who was charged with the sale and possession of marijuana and the possession of cocaine and pleaded guilty to a marijuana possession charge. A Hearing Officer of the Merit System Protection Board found that he had committed the three offenses with which he had been charged, but reinstated him after finding that the FAA had failed to demonstrate that his

removal would "promote the efficiency of the service" or that his involvement with drugs could "adversely affect [his] performance or the performance of others." An Administrative Law Judge affirmed that decision. On the FAA's appeal the full Board reversed, finding that the controller's "criminal conviction, viewed in the context of his drug-related misconduct on more than one occasion and the nature of his federal employment, permits a presumption that his reinstatement would impair the efficiency of the service."

The issue for the court was whether the dismissal of this drug dealer was in fact shown to "promote the efficiency of the service" as required by law and thus within the FAA's discretion. The court, citing the "likely impact upon pilots, controllers and the public at large . . . of knowledge that an individual dealing in drugs is working in the control tower," held that it was.

In *Great Western Food*, a truck driver overturned his 18-wheel rig and was cited for "drinking intoxicating liquor while on duty or within 4 hours prior" and for traveliing at a "speed greater than reasonable and prudent." Because the Company had failed to investigate the driver's version of the event, an arbitrator reinstated him but refused to award back pay since the grievant admitted he had been drinking. On motion to enforce the Award, the 5th Circuit refused on the ground that such enforcement would violate public policy. It found that the Federal Motor Carrier Safety Regulations prohibited such drinking, that the public policy of preventing people from drinking and driving was embodied in case law, applicable regulations, statutory law and pure common sense, that public policy was thus "well defined and definite" and that, therefore, enforcement of the grievant's reinstatement would not be ordered.

The Chairman raises no quarrel with those decisions. However, they are not this case. The issue in *Bosari* was whether the FAA had acted within its statutory discretion. This is the same FAA which, in this case, did not revoke Morrison's

certificate but suspended it and which has a stated Federal policy of returning recovering alcoholics to the flight line when companies will cooperate in monitoring and even returning recovered alcoholics to the line without monitoring after a minimum of 2 years of sobriety. Given that stated policy, and its express formalization in the FAR's, it cannot be gleaned from *Bosari* that reinstatement of some form, consistent with FAA procedures, would violate Federal public policy considerations.

The same reasoning is applicable to *Great Western Food*. There is no evidence there that the driver was an alcoholic or had entered a treatment program in which he had been successfully rehabilitated. From that record, the driver was an ordinary rule breaker. Moreover, if the public policy of a regulatory agency be the guide, the FAA's public policy is to recognize alcoholism as a treatable disease and to encourage treatment and an early return to productive employment.

Thus, these two cases are completely distinguishable from the matter before this Board and do not, singly or jointly, justify the conclusion that any Board action, short of sustaining discharge, would be contrary to public policy. As was said by the System Board in *McMurray*:

> "If the court decisions were final definitive declarations by a court of last resort *on a subject matter over which the court's jurisdiction applied to this Board*, a different result could occur." (Emphasis supplied.)

The Company also argues that prior System Board decisions justify its summary discharge of Morrison. The Chairman has read all of those Awards, which, as the Company acknowledges, are not completely consistent. In some, such as *Rall, Lee, Charlesworth* and *Clark*, discharge was reduced to suspensions of varying lengths. In others, such as *Niver, Adler* and *Wold*, discharge was upheld. While they show particular fact patterns and results, in none was the alcoholism defense raised. Thus, this case presents different considerations and is clearly distinguishable.

One case, submitted with permission after the receipt of briefs in the instant hearing, did involve alcoholism as a defense. That case was *McMurray*, decided March 27, 1984. There, the Board over Company dissent, held that alcoholism was a relevant consideration in a 24-hour rule violation case. It did so, as previously stated, because it believed, on the basis of the evidence presented, that "alcoholism is an illness and, therefore, the possibility of recovery from an illness is an element which should be considered in determining the appropriate remedy." Though McMurray's discharge was upheld, the decision suggested that in an appropriate case, if consistent with considerations of public safety, discharge might not be upheld depending on the nature of the offense and the possibilities of rehabilitation.

While holding that it would not in any case require the Company to apply the full benefits of its present alcohol treatment policy to rule violators, the *McMurray* Board, in stating that the discharge of a rule violator might not be upheld, adopted, in effect, a balancing of interests test. However, it did not thereafter reach the issue of the type of reinstatement it would order for McMurray because it found that he had failed in the balance. As that Opinion shows, McMurray, unlike Morrison, whose prior record was spotless, had a horrendous history, including numerous alcohol-related traffic violations and three prior failures of rehabilitation, all of which he had failed to disclose to the FAA or the Company. Moreover, and again unlike Morrison, those responsible for McMurray's latest attempt at rehabilitation rated his chances of success at 50-50. Additionally, he had been sentenced to two 6-month jail terms for two DWI convictions which had been temporarily deferred pending the results of his earlier treatment. He was also awaiting sentence after a conviction of negligent homicide resulting from the accident that had occurred during his last 24-hour rule episode. Based on this record, the Board held that even assuming that alcoholism can excuse misconduct otherwise deserving of discharge, there was little likelihood that McMurray would recover and that "the risk to the public, the company and its employees was simply too great" for the Board to "order reinstatement in the hope that [he] might . . ."

Consistent with its dissent in *McMurray*, the Company offered other arguments here to support the view rejected therein that alcoholism should not be accepted as a defense in any 24-hour rule violation case. It argues that the Parties, as the *Long* and *Coniff* cases (NWA Exhibit 6A) show, have not recognized alcoholism as a medical condition entitling a pilot to sick leave or a medical leave of absence and that to require the Company even to consider alcoholism in a discipline case would be granting the illness a status not warranted by the Parties' "past conduct or negotiating history." There is a vast difference, however, between the conditions the Parties impose on sick leave and the considerations inherent in determining the appropriateness of a discharge. The Parties may limit sick leave for their own purposes. But that, standing alone, cannot control the disposition of a matter involving just cause when one of the issues is volition or the lack thereof.

The Company also argues that consideration of alcoholism would impose a dual standard and that non-alcoholic rule breakers could complain of disparate treatment if, on a diagnosis of alcoholism, the Company decided to treat the alcoholic differently. But different treatment is not necessarily disparate treatment. Arbitrators have long held that circumstances must be considered and that a wide range of factors (length of service, prior work record, degree of culpability, etc.) can properly be taken into account. Indeed, if those factors are not taken into account and "equal" treatment is imposed, that in itself might be disparate. Even though both may violate the 24-hour rule, the diagnosed alcoholic is in a clearly recognized category which differentiates him medically from the non-alcoholic. That different circumstance permits different treatment.

The Company further argues that on August 6th, it had only a layman's surmise that Morrison might be an alcoholic and that it had no obligation to extend itself to determine if this was a fact. However, it had much more than Brennaman's belief that day. It had Morrison's admissions. No one can read the transcript of that investigative meeting and conclude that Morrison was simply on a lark as were some others in previous cases. The amount, manner and time of his drinking all

demonstrate that he was addicted, severely ill, and out of control. Faced with evidence of that magnitude, it could be considered arbitrary for the Company to summarily fire him without gathering all the facts and first making a determination whether his actions were volitional or whether his conduct was medically related to alcoholism and an unavoidable result thereof. To refuse to take such a step, not only denies an airman (here, one with long service) a full and fair investigation of all the facts and circumstances, it also fails to take into account the overwhelming medical and psychological evidence that the untreated alcoholic does not commit willful, deliberate acts and that this, like other facts, must be weighed in the balance.

The Company's response is that in view of its clearly-stated rules and Morrison's violation of them its action would have been the same even if it knew with a certainty of his condition. But if this means that alcoholism is irrelevant once the 24-hour rule has been violated, that proposition has already been rejected by the *McMurray* Board. If it means that alcoholism will be considered if only to be rejected, it's clear that the Company did not do that in this case. Unlike *McMurray*, where the Company first granted a leave for the purpose of "alcoholic rehabilitation" and had a diagnosis before completing its investigation and taking final action (a process taking three months), here, as the foregoing summary of the facts demonstrates, it acted quite differently and without any consideration of the possible underlying cause.

Quite apart from that, the System Board has a responsibility at this juncture to determine, based on all the facts and circumstances, whether to sustain Morrison's termination as appropriate. Based on the rationale of *McMurray*, those facts and circumstances include Morrison's alcoholism and evidence of his rehabilitation, as well as his admitted rule violations and prior record. In deciding to consider post-discharge conduct of an alcoholic as relevant to "the possibilities of rehabilitation" and the appropriateness of a remedy, the *McMurray* Board said:

> ". . . such evidence is to be given less weight in cases involving a significant 24-hour rule violation. The

more serious the violation the less weight such evidence will receive."

In that case, the Board found McMurray's violation, which resulted in the death of another and a subsequent conviction for negligent homicide, "significant." It also found that his prospects for recovery were limited at best and the consequent risk "simply too great" for the Board to consider reinstatement under any conditions and therefore upheld his discharge.

McMurray did not fly subsequent to his drinking. He was injured in the accident and took himself off the flight. Morrison, as we know, did fly. It has already been noted that Captain Dill, whose version of the events contradicted Morrison's in some respects, did not observe, perhaps because of Morrison's exceptional tolerance, any indicia of impaired performance either before the flight or during it. Nevertheless, the fact that Morrison flew in the circumstances previously described made his violation, though compelled by alcoholism, more serious than McMurray's vis-a-vis the Company and the travelling public. That must weigh heavily against him.

On the other hand, Morrison's record of rehabilitation (as well as his pre-termination record) strikingly differs from McMurray's. In the words of Dr. Mann, Morrison, since August 1982, "has done all the appropriate things he would need to do to ensure his recovery . . . ." Moreover, the credible evidence is that the continuing treatment he has undertaken has resulted in his achieving rehabilitation, i.e., control over his behavior and abstinence from intoxicants. That achievement is very much in Morrison's favor. It would be one thing if his progress was akin to McMurray's or only somewhat better, but it is evident that this Record supports a finding of a consistent pattern of recovery over an extended period of time. That fact cannot be discounted, nor can Morrison's 16 years of unblemished service.

Thus, we have an employee, who after 16 years of service, committed serious offenses, but offenses that were the unavoidable consequence of the illness of alcoholism, which illness has been arrested and successfully treated. Our weighing of these factors leads a majority of the Board to conclude that Morrison,

despite the seriousness of the infractions, should be given an opportunity to demonstrate, as were the six diagnosed alcoholics listed in the *McMurray* Opinion, that he can meet the Company's standards for flying.

At present, the Federal Air Surgeon has found Morrison eligible for the special issuance of a medical certificate under Section 67.19 of the FAR's, as set forth in his letter of January 10, 1984. That certificate, as previously explained, requires monitoring and periodic reports by the Company and others. However, the Company's standards, quoted herein on pp. 20-21, do not recognize the monitoring process and require a certification that is unconditional. Accordingly, his reinstatement shall be so conditioned. That is to say, to be offered reinstatement, the present special issuance certificate is not enough. Rather, Morrison must qualify under the Federal Air Regulation's non-monitoring provision (Section 67.13(d)(1)(2)[c]), which provides *inter alia*, for "established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol for not less than the preceding 2 years." When he does so, reinstatement should be offered, subject to any other limitations the FAA may impose and the passing of a physical examination pursuant to the provisions of Section 15 of the collective bargaining agreement, but without back pay, fringe benefits and with no accumulation of longevity for pay purposes.

ALPA insists that the Board go further and treat Morrison, since he suffered from the illness of alcoholism, "retroactively in conformity with the new Northwest policy which affords sick leave and medical leave . . ." for that condition. This, however, would have the effect of applying the Company's treatment program to Morrison even though he violated the rules. The Board refuses to adopt that approach for two reasons. First, the policy by its terms cannot be so applied. Second, the approach was raised with and rejected by the *McMurray* Board. There, ALPA argued that it would be inequitable not to apply the policy to McMurray, but the Board disagreed. Dr. Mann in this case argued persuasively that the dichotomy created by the Company's policy tended to drive alcoholics underground and was counter-productive to eradicating pilot alcoholism, a con-

clusion similar to that reached by the FAA when it modified its strict 2-year rule to permit special issuance monitoring (NWA Exhibit 11, pp. 2 & 3). Nevertheless, it is the Chairman's judgment that there is simply insufficient evidence to support a conclusion that the policy change ALPA seeks would have the result intended. It might be, as the *McMurray* Board opined, "that persons who violate the 24-hour rule would assume that they could do so at least once, if they are alcoholics, because they would then be afforded the opportunity of treatment under the company's alcoholism policy regardless of their prior conduct or efforts at treatment."

Therefore, based on the evidence presented, this Chairman is not prepared to agree with the postulate, already rejected by the *McMurray* Board, that it is inequitable *per se* to offer the full benefits of the policy to those who come forward before being detected in a rule violation and to withhold those full benefits from those who do not. The Parties themselves may decide to make that change or the Company might initiate it unilaterally. However, in an area such as this, with the consequences and effects uncertain, this Chairman, particularly in light of Dr. Riordan's informed testimony supporting the need for some distinctions, is of the opinion that those primarily responsible for the policy should be the ones to act if they deem it advisable.

The Board's reduction of the penalty to what is, in effect, a suspension without pay or benefits until Morrison requalifies under the FAA's non-monitoring procedure, a decision based on our review of all the facts and circumstances including his rehabilitation, should not be construed to mean that the Company cannot, under its present policy, terminate rule violators who are found to be alcoholics. *McMurray,* where the Company acted only after a full gathering of all the relevant facts, was such a case and this Board does not disagree with either its reasoning or result. Those alcoholics who do not come forward before breaking the rules are still subject, upon a full review of the facts and their medical condition, to the severest of consequences, including termination. Moreover, their rehabilitation efforts, whether they are terminated or not, are

something for which they alone will bear full responsibility. Those who would attempt to reign alcoholism could, of course, be subject to the same fate.

All that is being said here is that on the facts as presented, Morrison's reinstatement, subject to unconditional qualification by the Federal Air Surgeon, is justified. Other facts may dictate other results.

A word should be said of the dissenting opinion by Company member Ohm.

It was apparent that the Company representative to this Board would dissent and the Chairman suggested that the dissent be memorialized before this Opinion and Award was executed. Mr. Ohm has done that and the Undersigned has considered it, as Mr. Ohm strongly urged.

The arguments raised in that dissent were anticipated and, to the Chairman's satisfaction at least, answered in the foregoing Opinion. However, it should be re-emphasized that the majority Award does not reinstate Mr. Morrison. The Award directs that he shall be offered reinstatement if and only if the Federal Air Surgeon determines that he meets the standards of Section 67.13(d)(1)(i)(c) of the Federal Air Regulations. Those standards are higher than the monitoring procedures, which the Company does not accept, and require "clinical evidence, satisfactory to the Federal Air Surgeon, of recovery . . . ." As previously stated, these are the same high standards the Company itself has required for other airmen. Inasmuch as the Federal Air Surgeon has the statutory authority to make such determinations and must do so with the highest regard for air safety, the Chairman is of the opinion that the Award herein is consistent with public policy and within the Board's authority to make.

/s/

George Nicolau, Chairman

October 29, 1984

SYSTEM BOARD OF ADJUSTMENT

NORTHWEST AIRLINES, INC. AND AIR LINE PILOTS ASSOCIATION

Grievance No. 405-82
Docket No. 82-23
Larry Morrison

DISSENTING OPINION

The majority Opinion and Award in this case is contrary to public policy and the Federal Aviation Act and clearly exceeds the jurisdiction and authority of the System Board of Adjustment.

Public policy requires that an airline's primary emphasis be on safety. Safety is similarly the principal obligation of an air carrier under the Federal Aviation Act. Section 601(b) of that act places the obligation on Northwest Airlines to perform its services with the "highest possible degree of safety in the public interest." This obligation necessarily requires Northwest to permanently remove from duty pilots, like Mr. Morrison, who have seriously compromised air safety by serving as a crew member while legally drunk. The effect of the majority Award in this case, if implemented, would be to undermine Northwest's efforts to meet its statutory obligations under the Federal Aviation Act.

The Chairman has concluded Morrison's misconduct in serving as a crew member on a Northwest Airlines flight while intoxicated was a significant violation of air safety and Company rules. Morrison's misconduct was found to be more serious than in the *McMurray* case where McMurray's discharge for a 24-hour rule violation was sustained. Despite this finding, the Chairman declared, both in executive session and in his written Opinion, that Morrison was not responsible for his drinking *nor for serving as a crew member while intoxicated* because he was an alcoholic and such actions were, therefore, nonvolitional. The majority Opinion then engaged in what it

called a "balancing test" and ruled that Morrison's gross violation of air safety was outweighed by his good work record and his post-discharge rehabilitation efforts.

The balancing test developed by the majority Decision is contrary to public policy, the Railway Labor Act and the Federal Aviation Act. The only balancing test that can be applied whenever a pilot serves as a crew member while legally drunk (as did Morrison) is to weigh public safety against the vocational interest of the pilot involved. Clearly, the individual pilot's interest must yield to the overwhelming public interest in safe transportation. To do otherwise places the private, economic interest of an individual airman over the safety of the traveling public. This latter approach was vigorously condemned by a Federal District Court in *Delta Airlines, Inc. v. United States,* 490 F.Supp. 907 (N.D.Ga. 1980).

Having compromised public safety by flying while legally drunk, Morrison has demonstrated that he is not able to meet the standards required to secure the highest degree of safety in air transportation. This conclusion is the same whether Morrison's action in flying while drunk is regarded as volitional or nonvolitional. If, as the majority concludes, Morrison's actions were nonvolitional when he flew while drunk, his reinstatement clearly creates a substantial risk of catastrophe since it is likely that he would repeat the performance should he suffer a relapse. In the interest of the safety of the traveling public, Northwest Airlines cannot accept such a risk, and the System Board has no jurisdiction to interfere with and impair the efforts of Northwest Airlines to eliminate this risk.

This Board's reinstatement of Morrison creates a "dual standard" of discipline which treats alcoholic rule violators more favorably than nonalcoholic ones. This dual standard will undercut the deterrent effect of the Company's rule. It will serve to encourage alcoholics to remain in the cockpit and continue to jeopardize air safety by assuring them that they will not lose their jobs even if they are caught in a rule violation. This approach is totally inconsistent with air safety and is contrary to the mandate of maximizing air safety contained in

public policy and in the Federal Aviation Act. Since the System Board has exceeded its authority and jurisdiction by ignoring this mandate, I dissent from the majority Award.

Respectfully submitted,

/s/

Randall B. Ohm

Appendix D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1986
Civil Action No. 84-03434

No. 85-6228

NORTHWEST AIRLINES, INC.

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellant

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Before: EDWARDS and BORK, Circuit Judges, and SWYGERT,* Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

George A. Fisher
Clerk

Date: January 6, 1987
Opinion for the Court filed by Circuit Judge Edwards.

Appendix E

Railway Labor Act: 45 U.S.C. § 153

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of para-

graph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel; or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided,*

however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the

event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside, the order of the division of the Adjustment Board: ***Provided, however,*** That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure

of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceed-

ings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor

members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such

request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment; and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall be mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation

Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

Railway Labor Act: 45 U.S.C. § 184

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Federal Aviation Act: 49 U.S.C. § 1302(a)(1), (2)

§ 1302. Consideration of matters in public interest by Board

(a) Factors for interstate, overseas, and foreign air transportation

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 1307 of this title.

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

Federal Aviation Act: 49 U.S.C. § 1421(a), (b)

§ 1421. Powers and duties of Secretary of Transportation

(a) Minimum standards; rules and regulations

The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Secretary of Transportation may find necessary to provide adequately for national security and safety in air commerce.

(b) Consideration of needs of service; classification of standards, rules, regulations, and certificates

In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules,

regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Secretary of Transportation may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Secretary of Transportation shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter.

Federal Aviation Regulations: 14 C.F.R. § 91.11 (1986)

§ 91.11 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft—

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

(3) While using any drug that affects the person's faculties in any way contrary to safety; or

(4) While having .04 percent by weight or more alcohol in the blood.

(b) Except in an emergency, no pilot of a civil aircraft may allow a person who appears to be intoxicated or who demonstrates by manner or physical indications that the individual is under the influence of drugs (except a medical patient under proper care) to be carried in that aircraft.

(c) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(1), (a)(2), or (a)(4) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor, or other person to release

to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crew-member that indicates percentage by weight of alcohol in the blood.

(d) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(3) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor, or other person to release to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates the presence of any drugs in the body.

(e) Any test information obtained by the Administrator under paragraph (c) or (d) of this section may be evaluated in determining a person's qualifications for any airman certificate or possible violations of this chapter and may be used as evidence in any legal proceeding under section 602, 609, or 901 of the Federal Aviation Act of 1958.

Supreme Court, U.S.
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No. 86-1548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

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QUESTIONS PRESENTED

First Officer Larry W. Morrison was discharged by Northwest Airlines for serving as co-pilot on a passenger jet while under the influence of alcohol. A System Board established pursuant to the Railway Labor Act mitigated the penalty to a suspension, with reinstatement explicitly made dependent upon Mr. Morrison's unconditional requalification to return to duty by the Federal Aviation Administration. The Board expressly based its award on the totality of facts and circumstances, including findings that Mr. Morrison's misconduct was caused by alcoholism for which he was subsequently treated and that he has been successfully rehabilitated as evidenced by a consistent pattern of recovery over an extended period of time.

1. Whether the Federal Aviation Act deprived the System Board of jurisdiction to overturn the carrier's determination that Mr. Morrison must be discharged?

2. Whether in any event the System Board's award is contrary to public policy and, therefore, judicially unenforceable?

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BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

STATEMENT

1. Morrison's Discharge

On August 6, 1982, First Officer Larry W. Morrison was discharged by Northwest Airlines, Inc. ("Northwest") for violating the Company's rules prohibiting the consumption of alcoholic beverages within 24 hours of flight duty and for being under the influence of alcohol during a flight on which he served as a crew member. (Pet. App. 3a-4a, 53a-54a) Until then, Mr. Morrison had been a pilot with Northwest

for sixteen years with an unblemished disciplinary record. (Pet. App. 3a, 50a)

The circumstances that resulted in Mr. Morrison's dismissal were that he had been drinking during a thirty-hour stopover in Las Vegas and became ill several hours before his next scheduled flight. (Pet. App. 3a, 50a-51a) Although he asked to be replaced on the flight, no replacement was available, and he was told that the flight would have to be cancelled if he could not fly. Hence, he agreed to perform his duties as co-pilot for the first two legs of the flight, with the understanding that a substitute would be found for the final leg. (Pet. App. 3a, 51a) The flight proceeded to its first stop at San Francisco without incident. To the Captain (pilot-in-command), Mr. Morrison's appearance was "perfectly normal" and he did "an excellent job." (Pet. App. 51a) Nevertheless, alerted by a station agent in Las Vegas whose suspicions were triggered because Morrison was late for crew pick-up, did not "look very well," and was chewing tobacco early in the morning,[1] Northwest officials in San Francisco ordered Morrison to submit to a blood test. The test showed Morrison to have a blood alcohol level of .13%.[2]

At a subsequent investigation conducted by Northwest, Mr. Morrison described a history of "drinking

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[1] In fact, Morrison, who had a farming and ranching background, "chewed tobacco almost constantly." (Pet. App. 52a, n.2)

[2] FAA regulations prohibit any person from serving as a crew member with a blood alcohol level of .04% or more. 14 C.F.R. § 91.11(a)(4) (1986). State law in California establishes a presumption of intoxication with respect to a person with a blood alcohol content of .10% or more. (Pet. App. 3a-4a, 54a).

straight from the bottle for some 10 years," to the point where his tolerance for alcohol had become so great "that if he had drunk a pint an hour before the meeting, no one would have been able to detect from his behavior that he had been drinking." Although it occurred to him that he might be an alcoholic, he feared he would be fired by Northwest if he sought treatment for his drinking problem. (Pet. App. 4a, 52a-53a) During the course of Northwest's investigation, a representative of the Air Line Pilots Association ("ALPA"), the collective bargaining agent for the Northwest pilots, suggested that the investigation be extended to determine if Morrison was an alcoholic because "[i]t would be a serious mistake. . . to treat it as a straight misconduct case without investigating whether or not there is an underlying medical problem." (Pet. App. 53a) However, the Company declined and instead terminated Morrison.

2. The System Board Award

As required by § 204 of the Railway Labor Act ("RLA"), 45 U.S.C. § 184, the applicable collective bargaining agreement between ALPA and Northwest established a System Board of Adjustment to resolve "disputes between any employee covered by the Pilots' Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement." (Pet. App. 9a) ALPA grieved Mr. Morrison's discharge, and in due course the grievance was submitted to the Board, with the issue being whether the discharge was for good cause, and, if not, what the appropriate remedy should be. (Pet. App. 4a, 49a)

The Board, comprised of one member each appointed by ALPA and Northwest and a neutral Chair-

man, heard extensive and unrefuted evidence concerning Mr. Morrison's alcoholism and the prospects for his rehabilitation. With the Northwest member dissenting, the Board found that Morrison was "an untreated alcoholic" when he flew as co-pilot on August 1, 1982, and that his "uncontrolled drinking and subsequent flying under the presumptive influence were medically related to and the result of his affliction." (Pet. App. 66a) The Board further found that Morrison had completed a comprehensive alcohol treatment program, had remained abstinent since, and had been successfully rehabilitated as evidenced by a "consistent pattern of recovery over an extended period of time." (Pet. App. 4a, 56a, 72a) Additionally, the Board determined that on January 10, 1984 the FAA had declared Morrison eligible for "a special issuance" first-class medical certificate which would permit him to pilot commercial aircraft again if ALPA and Northwest would monitor and periodically report on his continued abstinence. (Pet. App. 5a, 56a) The Board further determined that Morrison would be eligible under FAA regulations[3] for unconditional first-class medical certification—that is, without the monitoring and reporting requirements—if and when the clinical evidence, including not less than two years of sustained total abstinence, satisfied the Federal Air Surgeon as to his recovery.[4]

Based "on all the facts and circumstances" before it, the Board concluded that Morrison's discharge was

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[3] 14 C.F.R. § 67.13(d)(1)(i)(c) (1986).

[4] Subsequent to the Board's award, and after more than three years of abstinence, Morrison did receive his unconditional first-class medical certification from the Federal Air Surgeon. (Pet. App. 5a)

without just cause, and that he should be offered reinstatement, without back pay or benefits, if and when the FAA issued him an unrestricted first-class medical certificate. (Pet. App. 4a-5a, 71a-75a) The Board acknowledged that Morrison's misconduct was "serious" and "must weigh heavily against him" (Pet. App. 72a), but that his alcoholism, rehabilitation, and lengthy service were significant countervailing factors. (Pet. App. 66a, 72a-73a) The Board was careful to state that it was not promulgating any general rule "that the Company cannot, under its present policy, terminate rule violators who are found to be alcoholics;" rather, "[t]hose alcoholics who do not come forward before breaking the rules are still subject, upon a full review of the facts and their medical condition, to the severest of consequences, including termination." As the Board emphasized, "[a]ll that is being said here is that on the facts as presented, Morrison's reinstatement, subject to unconditional qualification by the Federal Air Surgeon, is justified," and that "[o]ther facts may dictate other results." (Pet. App. 6a, 74a-75a). As a final point, the Board stated that "[i]nasmuch as the Federal Air Surgeon has the statutory authority to make [medical fitness] determinations and must do so with the highest regard for air safety, . . . the award herein is consistent with public policy and within the Board's authority to make." (Pet. App. 6a, 75a)

3. The District Court's Decision

As the District Court saw the issue before it, there were two strong federal policies involved here: the federal policy of furthering safe air travel and the federal policy of resolving labor differences through arbitration; hence, "the central question . . . is

whether the balance between the two federal policies lies sufficiently in favor of air safety to rule that the arbitrator has exceeded his jurisdiction or 'acted contrary to public policy' in ordering Morrison's reinstatement." (Pet. App. 37a) In the District Court's view, because application of the Company's 24-hour rule to Morrison's situation is "a matter about which the collective bargaining agreement is silent"—that is, it involves only a grievance rather than interpretation of specific contract language—then, "[a]t best, the subject matter of the dispute sits only on the outer perimeter of the arbitrator's jurisdiction." (Pet. App. 38a, 45a) The District Court faulted the Board for denying Northwest the "right" to enforce its own safety rules, even though Northwest's rules on alcohol were not incorporated in the collective bargaining agreement. (Pet. App. 38a-39a) As the Court put it, "[i]f safety rules are listed as a legitimate subject for arbitration under the collective bargaining agreement, or if the rules are clear [*sic,* "unclear"?], judicial review might well not be permissible." (Pet. App. 42a) However, in this case "no specific agreement was reached to submit safety matters to arbitration," and, therefore, "the arbitration Board has exceeded its jurisdiction not because the Company retains *exclusive* jurisdiction over safety matters under the FAA, but because the Board's decision substantially interferes with air safety responsibilities entrusted to Northwest without encroaching unduly on concerns underlying federal arbitration policy." (Pet. App. 39a, 42a-43a)

The District Court also concluded that "the Board's interference with Northwest's enforcement of its 24-hour rule was [not] entirely consistent with public policy." (Pet. App. 44a) The Court reasoned that

"[t]he public policy against the use of alcohol and flying is 'well-defined and dominant,' " and "that national policy . . . incorporates both the concept of deterrence (through rehabilitation and reinstatement), and that of incapacitation (dismissal for violation of a 24- or 8-hour rule)." (Pet. App. 43a, 44a)

4. The Decision of the Court of Appeals

The Court of Appeals reversed. Citing the RLA provision which makes system board awards "final and binding" (RLA § 3, First (m), 45 U.S.C. § 153, First (m) (1982)) and the emphatic comment in *Union Pacific R.R. v. Sheehan,* 439 U.S. 89, 93 (1978) that "this statutory language means just what it says," the Court addressed the issue of "whether the Board's decision falls within the scope of its jurisdiction." (Pet. App. 8a) The Court found it "absolutely clear" from the "explicit terms" of the ALPA/Northwest collective bargaining agreement "that an unresolved grievance claiming the absence of 'just cause' with respect to a disciplinary action taken against a pilot is a 'dispute' within the jurisdiction of the Board." (Pet. App. 9a) Indeed, "[t]here is *nothing* in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review," nor is there any "conceivable way to construe the parties' agreement as removing from the Board's jurisdiction disciplinary actions related to alleged breaches of the twenty-four hour rule." (Pet. App. 10a) Moreover, "in reviewing the grievance, it is equally plain that the Board was authorized to judge the legitimacy of the disciplinary penalty imposed in the light of mitigating circumstances . . . because '(a)rbitral determination . . . of the fitness of the punishment is routinely grist for

the arbitral mill,' " citing *Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers,* 416 F.2d 198, 202 n. 10 (5th Cir. 1969). (Pet. App. 9a)

The appellate court rejected as totally unsupported "the District Court's imposition of a presumption against arbitration of safety issues." (Pet. App. 10a) It held instead that the "fact that the arbitration touches on issues related to airline safety is irrelevant." In short, the Court said, "[i]n all critical respects, . . . this case involves a straightforward application of well-established law concerning the *limited* role of the courts in reviewing labor arbitration awards . . ." (Pet. App. 9a, 11a)

The Court of Appeals likewise characterized as "meritless" Northwest's contention "that the Board's decision is somehow contrary to public policy." (Pet. App. 12a). Drawing the controlling principles from *W.R. Grace & Co. v. Local Union 759, Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983) and its own recent decision in *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1, 8 (D.C. Cir. 1986)—*i.e.*, that the public policy exception to enforcement of arbitration awards "applies only when the public policy emanates from clear statutory or case law, '*not from general considerations of supposed public interests*' "—the Court saw nothing "unlawful" either in the Board's "determination that Morrison's alcoholism was an illness that could not support a finding of 'just cause' for dismissal in this case" or in the "policy of allowing reformed alcoholics to fly as pilots . . ." (Pet. App. 12a-13a) Especially significant in the Court's view is that the "Board's decision merely required Northwest to reinstate Morrison if and when

he was recertified by the FAA as fully fit and licensed to fly." (Pet. App. 13a) For, as the Court put it, "[t]o suggest that the Board's award violates public policy is to contend that the FAA was derelict in its responsibilities in considering Morrison for recertification. . . .It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty." (Pet. App. 13a) In any event, the Court noted, "this is not a situation in which the Board has permitted a drunkard to pilot an aircraft, nor did it treat lightly the fact that Morrison had flown an aircraft while under the influence of alcohol." Instead, the "Board carefully considered all safety issues and applied stringent prerequisites to allowing Morrison to fly again. (Pet. App. 14a, n. 33)

ARGUMENT

The Court of Appeals correctly evaluated this case as one which involves nothing more than "a straightforward application of well established law" to judicial review of Railway Labor Act system board awards. The appellate court was equally correct in its application of those principles to the particular facts and circumstances of the case. Hence, the decision does not warrant any further review by this Court.

I. THE SYSTEM BOARD HAD JURISDICTION TO DETERMINE WHETHER THERE WAS JUST CAUSE FOR MORRISON'S DISCHARGE AND, IF NOT, WHAT SHOULD BE THE APPROPRIATE PENALTY

It is well settled that a labor arbitration award which "draws its essence from the collective bargaining agreement" must be enforced. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597

(1960). The judicial role "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract," and "[t]he courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960). Moreover, "[i]n the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *AT&T Technologies, Inc. v. Communications Workers*, ___ U.S. ,___, 106 S. Ct. 1415, 1419 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 584-85 (1960).

The RLA establishes a "mandatory, exclusive and comprehensive" scheme of grievance arbitration in the airline industry by requiring that "disputes between an employee. . . and a carrier. . . growing out of grievances. . ." be submitted to System Boards of Adjustment for "final and binding" resolution. 45 U.S.C. §§ 153 First (m), 184; *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963): *accord, Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978). The range of judicial review of System Board awards is "amongst the narrowest known to law" (*Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970)), for the RLA explicitly limits such judicial review "to three specific grounds: (1) failure of the. . . Board to comply with the requirements of the. . . Act; (2) failure of the . . . Board to conform, or confine, itself to matters within

the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. 153 First (q)." *Sheehan,* supra, 439 U.S. at 93.

Northwest argues that "this case presents the important, unresolved and recurring question of the interplay between an air carrier's safety obligations under the Federal Aviation Act and the mandatory arbitration of grievances under the Railway Labor Act." (Pet. 19) Contrary to Northwest, if there are any legitimate questions concerning the interplay between the two Acts, none are presented by this case. If anything, the case offers a textbook example of intelligent accommodation: the System Board set aside Morrison's discharge and awarded him reinstatement (without any back pay), but only if and when the FAA, which has a statutory duty to "assure safety in air commerce" (49 U.S.C. § 1422(b)(1)), issues him an unrestricted medical certification.

Northwest suggests that System Board jurisdiction in this case is undercut by 49 U.S.C. § 1421(b), which provides that "[i]n prescribing standards, rules, and regulations, and in issuing certificates. . ., the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest. . ." This provision recognizes that there is an implicit duty on air carriers—as, indeed, there is on all other enterprises—to conduct their business in a manner commensurate with the safety risks involved. It is precisely because safety is such a major concern in air travel that the Federal Aviation Act mandates close government oversight, directs the Secretary in 49 U.S.C. § 1421(b) to ensure that carriers comply with their safety responsibilities,

and gives him broad authority (49 U.S.C. §§ 1421-1441) to see that they do so. The implication is not, as Northwest would have it, that the Federal Aviation Act creates a safety related exception to the normal jurisdiction of RLA System Boards; it is rather that safety is too important a matter to be entrusted to the airlines alone. Moreover, the Federal Aviation Act elsewhere makes clear that its provisions are not intended to undermine the RLA's statutory procedures: 49 U.S.C. § 1371(k)(3) expressly states that "[n]othing herein contained shall be construed as restricting the right of any. . . pilots or co-pilots, or other employees, of any. . . air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions." It is not consistent with § 1371(k)(3) to rely on the Federal Aviation Act to deprive a pilot discharged for a safety violation—even a serious one—of his right under a collective bargaining agreement and the RLA to have a System Board determine whether there is "just cause" for his discharge. If the law were otherwise—that is, if carriers had discretion unfettered by System Board review to mete out discipline for alleged or actual safety infractions—then in an industry like air transportation, and particularly for pilots, a key aspect of the Railway Labor Act would largely be nullified.

In view of the foregoing, it is scarcely surprising that a number of court decisions have upheld System Board awards which conflicted with carriers' safety determinations. *E.g, Gunther v. San Diego & Arizona Eastern Railway,* 382 U.S. 257, 262-264 (1965) (train engineer's health and physical ability to operate an engine); *ALPA v. Eastern Air Lines,* 632 F.2d 1321 (5th Cir. 1980) (Board overturned discharge of pilot

who had failed to satisfy proficiency requirements); *Hart v. Overseas National Airways,* 94 LRRM 3133 (E.D. PA, No. 73-2448, Feb. 17, 1977) (Board rejected carrier's determination on critical safety matter); *ALPA v. Capitol Airways,* 83 LRRM 2169 (S.D. N.Y., No. 72 Civ. 3015, Apr. 2, 1973) (Board overruled carrier's determination regarding upgrade to Captain). Indeed, in *Northwest Airlines, Inc. v. ALPA,* 373 F.2d 136 (8th Cir. 1967), *cert. denied,* 389 U.S. 827 (1967)—a case which also involved the discharge of pilots for violating Northwest's rules governing the use of alcoholic beverages—the Eighth Circuit explicitly sustained the trial court's determination that a System Board's award of reinstatement must be accorded finality.

Moreover, this Court's decision in *Western Air Lines v. Criswell,* 472 U.S. 400 (1985) further refutes the novel contention that a System Board lacks jurisdiction to overrule an airline's decision on employee discipline where safety is implicated. *Criswell* fully recognized and specifically took note of the public interest in safety and the special need "to err on the side of caution" in air transportation. 472 U.S. at 419-420. Nonetheless, the Court concluded that a jury of lay persons could appropriately evaluate a carrier's contention that implementation of a particular safety policy—in that case, a rule requiring flight engineers to retire at age 60—is "reasonably necessary" to the safe operation of its business. It would be incongruous to permit a jury to make that evaluation, and yet to hold that a System Board lacks jurisdiction under the RLA to evaluate a carrier's contention that nothing less than the discharge of a pilot will suffice to satisfy legitimate air safety concerns.

Northwest argues that the holding here conflicts with that of the Ninth Circuit in *World Airways, Inc. v. International Brotherhood of Teamsters,* 578 F.2d 800 (9th Cir. 1978). (Pet. 20-21) In *World,* an arbitrator directed that a pilot who had been demoted for undisputed "judgmental deficiencies" be offered retraining and an opportunity to requalify as Pilot-in-Command. The district court, however, specifically found that these "judgmental deficiencies" rendered the pilot unfit to serve as Pilot-in-Command, and could not be cured through retraining. The appellate court determined that the lower court's findings were fully warranted by the record (578 F.2d at 802). *World Airways* will not support the expansive reading Northwest seeks to give it in order to demonstrate a conflict. In *Association of Professional Flight Attendants v. American Airlines, Inc.*, 767 F.2d 1331 (9th Cir. 1985), the carrier, relying on *World Airways,* asserted "that because beards raise safety concerns, the issue of whether flight attendants should be allowed to wear beards is not subject to arbitration." 767 F.2d at 1334. Not only did the Ninth Circuit reject that contention, it also made clear that a "less intrusive remedy" than complete reinstatement to Pilot-in-Command "might well have fared differently" in *World Airways. Ibid.* In other words, it was not that the arbitrator generally lacked jurisdiction over the carrier's determination in *World Airways,* but rather that he lacked jurisdiction to order a remedy which, so far as appears, did not involve the FAA and which the court specifically found endangered public safety because of the pilot's unremediable deficiencies. *World Airways* is thus factually distinguishable from this case in which the System Board

awarded Morrison reinstatement only if and when the FAA deems him fully safe to return to flight duty.

II. THE REFUSAL OF THE COURT OF APPEALS TO FIND A PUBLIC POLICY EXCEPTION TO ENFORCEMENT OF THE BOARD'S AWARD IS WELL GROUNDED IN THIS COURT'S DECISION IN *W.R. GRACE*

As this Court plainly stated in *W.R. Grace & Co. v. Local Union 759, Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983), an arbitration award may not be set aside based on "general considerations of supposed public interest." To be deemed judicially unenforceable, the award must be violative of "some explicit public policy" which "must be well defined and dominant, and is to be ascertained by 'reference to the laws and legal precedents. . .' "

Obviously, there is a "well defined and dominant" public policy based on safety considerations that pilots should not fly when intoxicated. But neither the policy itself nor its effective administration precludes from reinstatement a pilot who, although he flew while "under the influence," was suffering from alcoholism, a medically recognized condition characterized by compulsive out-of-control drinking; who, according to the uncontroverted evidence, subsequently has been successfully treated for alcoholism and rehabilitated; and who is now entitled to reinstatement only because the appropriate federal officials—*i.e,* those charged by law with issuing airman certificates in a manner "necessary to assure safety in air commerce" (49 U.S.C. § 1421(b))—unconditionally recertified him based on satisfactory evidence that he had been abstinent for more than three years.

Northwest asserts that "those involved in public transportation who drink and jeopardize safety are unworthy of the public trust." (Pet. 12-13) A generalization of this nature, however, simply does not translate into a concrete public policy that such individuals may never be reinstated to their former positions and presumably must forever be barred from obtaining any similar positions with other carriers. To be sure, common sense dictates that they not be permitted to return to duty without due regard for safety. And the cases cited by Northwest (Pet. 14 n.5) stand for just that limited proposition. For instance, in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), an appellate court refused to enforce an arbitration award reinstating a truck driver who admitted to drinking shortly before he overturned his eighteen wheel rig on the highway. In that case, though, the court was confronted with an arbitration decision which returned the driver to his prior duties without any meaningful rationale for doing so and especially without much assurance he would not drink and drive again (712 F.2d at 124). But that is a far cry from this case, in which the safety concerns have been fairly addressed by both the System Board and the Court of Appeals (*supra*, pp. 5, 8-9). Once those concerns have been satisfied, as they have here, there is little logic to insisting that public policy demands continued denial of the opportunity to fly again. Northwest cites no precedent, nor have we discovered any, for invoking the public policy exception in a situation even remotely comparable to that of Mr. Morrison—that is, in which the award ordering reinstatement recognized the serious nature of the misconduct, but also took into account subsequent re-

habilitation, continued abstinence over an extended period, and unconditional recertification by the FAA.

Northwest complains that the award treats voluntary intoxication as a defense to wrongful conduct, and is thus at odds with civil and criminal law. (Pet. 14) The complaint is without substance. As shown *supra*, p. 5, the Board went out of its way to make clear that it did not consider alcoholism a defense and that its decision should not be taken to mean that Northwest could not "terminate rule violators who are found to be alcoholics." What it said, instead, is that "alcoholism is an illness and that, as another Board said in. . . [a prior case involving ALPA and Northwest], 'the possibility of recovery from an illness is an element which should be considered in determining the appropriate remedy.' " (Pet. App. 55a, 69a) Northwest offers no persuasive showing that the latter position is in any way inconsistent with established public policy within the meaning of *W.R. Grace*. On the contrary, as the Board itself observed, "if the public policy of a regulatory agency be the guide, the FAA's public policy is to recognize alcoholism as a treatable disease and to encourage treatment and an early return to productive employment." (Pet. App. 68a)[5]

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[5] Expert medical witnesses testifying before the Board accepted as valid the FAA's definition of alcoholism, as contained in an FAA notice dated November 10, 1976, titled *Alcoholism And Airline Flight Crewmembers*, which was introduced as an exhibit at the hearing. That definition reads: "Alcoholism. . . is a diagnosable disease in those whose alcohol intake is great enough to damage physical health, or personal or social functioning (which includes occupational functioning,), or when it has become a prerequisite to normal functioning." (Pet. App. 56a-

Finally, Northwest contends that public policy embodied in the Federal Aviation Act gives it independent authority "to assure air safety by employing only pilots that Northwest believes have the character and judgment necessary to protect the safety of its passengers." (Pet. 17) Undoubtedly Northwest does have a responsibility to employ competent pilots. But, as shown *supra*, pp. 11-13, that does not mean it is the sole judge of pilot qualifications and can terminate employees at will without regard to the grievance/arbitration provisions of the RLA. If Northwest could discharge pilots for lack of proper character or judgment without having to objectively justify its assessment before a System Board, then RLA and contractual protections would, indeed, be illusory.

We submit the public policy issue raised by Northwest can best be placed in perspective in light of the question asked by Judge Edwards during oral argument at the appellate level: could Northwest and ALPA have entered into a collective bargaining agreement which provided that a pilot who was guilty of job-related misconduct attributable to alcoholism would be reinstated after completion of a high quality treatment program, recovery as indicated by at least two years of continuous abstinence, and unconditional recertification by the FAA? If the answer is "yes", as it clearly should be, then it cannot be against public policy for a System Board to make that determination

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57a). *See also*, The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-1.(b)(1), which provides, in pertinent part, that "[n]o person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the grounds of prior alcohol abuse or prior alcoholism."

when the contract itself is silent on the "just cause" issue. As the Court of Appeals pointed out, if Northwest is uncomfortable with that result, it "is free to negotiate with ALPA to remove the application of safety rules from the jurisdiction of the Board or to reduce the amount of discretion given to the Board on such matters." (Pet. App. 14a)

III. THE GRANT OF CERTIORARI IN *MISCO* IS NOT ADEQUATE REASON TO GRANT CERTIORARI IN THIS CASE

Northwest urges that this case be heard in tandem with *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, ___ U.S. ___, 107 S. Ct. 871 (Jan. 12, 1987, No. 86-651). (Pet. 8-10) In *Misco*, the employer discharged an employee for violating a company rule against possession of marijuana on company property. An arbitrator reinstated the employee with full back pay and seniority because he found the evidence did not establish the employee had violated the rule. The Fifth Circuit, affirming a district court's refusal to enforce the award, evaluated the evidence itself and concluded that the employee was, indeed, a rule-violator and that his dismissal was therefore justified on public policy grounds. There are three reasons why this case is different from *Misco*, and, accordingly why the grant of certiorari in *Misco* does not warrant granting certiorari in this case or holding it in abeyance pending a decision in *Misco*.

First, for the reasons set forth by Judge Tate in his dissent (768 F.2d at 743-746), the decision in *Misco* violates "settled principles by which judicial review of arbitration awards is 'sharply circumscribed.'" Specifically, Judge Tate found inconsistent with the

Steelworkers' Trilogy[6] the majority's reevaluation of "(a) the arbitrator's factual evaluation of the evidence as not proving that Cooper possessed or used marijuana on the plant premises, (b) the arbitrator's interpretation of the contractual provision as not providing grounds for discharge if Cooper was in a vehicle where someone else was smoking marijuana, or (c) the arbitrator's procedural ruling that evidence unknown to the employer at the time of his discharge. . . was not probative of the issue before the arbitrator. . ." (768 F.2d at 744). By contrast, the Court of Appeals in the instant case followed the principles laid down in the *Trilogy* cases, and enforced the System Board award; hence, there is no reason for this Court to review the decision here.

Second, in *Misco,* having made its own finding that the employee had brought marijuana on to the employer's premises, the Court had no assurances that he would not do so again if he were reinstated. As the majority thus saw the issue, the employer could not adequately protect the safety of the workplace and of other employees if a confirmed drug user were permitted to return to his job, which involved operating dangerous machinery (768 F.2d 742-743). In the Court's view, public policy precluded such a result. But the majority opinion provides scant basis for believing that the outcome would have been the same in the totally different context of the case at bar: *i.e,* a detailed and well reasoned System Board opinion in which the Board did not minimize the seriousness

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[6] *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navig. Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).

of the misconduct and "carefully considered all safety issues and applied stringent prerequisites to allowing Morrison to fly again." (Pet. App. 14a n.33) In short, the public policy considerations which led the Fifth Circuit to intervene in *Misco* are simply not present here.

Third, in *Misco* there was no governmental agency assigned to determine whether the employee's reinstatement was consistent with the public interest. Here, of course, Morrison's reinstatement was explicitly made contingent on his unconditional recertification by the FAA. Unlike *Misco,* in which a far broader public policy issue is present, this case presents only the narrow issue of whether a court is compelled "under the guise of 'public policy,' to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue." (Pet. App. 13a)

CONCLUSION

For the reasons set forth above, the Air Line Pilots Association requests that the petition for certiorari be denied.

Respectfully Submitted,

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No. 86-1548

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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NORTHWEST AIRLINES, INC.,

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

REPLY BRIEF OF NORTHWEST AIRLINES, INC. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

Petitioner Northwest Airlines, Inc. submits this reply brief in support of its petition for a writ of certiorari.

1. Respondent Air Line Pilots Association ("ALPA") has buried in the back of its brief its argument about the relationship of this case to *Misco, Inc. v. United Paperworkers International Union*, No. 86-651. Opp. at 19-21. ALPA's ostrich-like behavior, however, cannot hide the fact that the issue in this case is identical to that in *Misco*. Indeed, ALPA does not dispute that. Nor does ALPA dispute that this case presents the "other side" of the circuit conflict that prompted the grant of the writ in *Misco*, in a context uncluttered by procedural and factual complications. *See* Pet. at 9-10.

Instead, ALPA simply tries to distinguish *Misco* from this case *on the merits*. That is beside the point. We do not doubt that the two cases are factually different and may be legally distinguishable. Contrary to ALPA's contention, however, that

difference is exactly why this Court should hear the cases *in tandem*. By considering together two cases at the extremes of the circuit conflict—the most expansive (*Misco*) and the most restrictive (this case) of the circuit positions on the "public policy" exception—this Court can better define the proper scope of the public policy doctrine.

2. In addition, ALPA's attempt to distinguish *Misco* fails. ALPA claims that *Misco* implicated a cognizable "public policy" because the court there lacked "assurances" that the discharged employee would never again engage in safety-related misconduct, whereas in this case "public policy" is not threatened because such "assurances" exist. Those "assurances," according to ALPA, are the facts that (unlike *Misco*, ALPA asserts) the arbitrator in this case purportedly considered the safety issues and a government agency decided that reinstatement was consistent with the public interest. ALPA is wrong on both counts.

ALPA's first distinction—the claim that the arbitrator here carefully considered public safety—simply begs the question. The very issue to be decided is whether a labor arbitrator is authorized to reverse an air carrier's safety determination. As *amici curiae* Air Transport Association and Airline Industrial Relations Conference have pointed out, airlines and unions have never included safety-related rules on drinking in their collective bargaining agreements, nor have they considered such rules the proper subject for reexamination by grievance arbitrators. For these reasons, the entire airline industry views the decision below as interferring with air carriers' ability to carry out their statutory safety obligations concerning drinking by pilots, and as muddying the waters concerning the enforceability of carriers' alcohol policies. *See* ATA/Air Conf. Br. at 11-13.

ALPA's second distinction—the insinuation that FAA recertification cures the problem—is also wrong. The FAA's action in this case does not even address the public policy at issue here, which is whether an airline is entitled to have a policy that makes flying an airplane while under the influence of liquor "just cause" for dismissal, regardless of any medical

treatment the pilot may *later* obtain. Moreover, the FAA's recertification of Morrison does not offer much assurance even about the pilot's reliability in the future. The FAA has been willing to recertify alcoholic pilots despite a relapse rate of 10-25%—and to re-recertify *relapsed* alcoholic pilots despite a re-relapse rate of 50% of more.[1] This pattern shows that the FAA's involvement hardly offers much reassurance.

Blind reliance on the FAA is not the answer here. Indeed, ALPA's argument that safety could not possibly be compromised because the FAA recertified Morrison is particularly ironic in light of ALPA's recent, appropriate—and successful—efforts to force the resignation of the Federal Air Surgeon who recertified Morrison in early 1986. ALPA accurately and candidly accused the former Federal Air Surgeon of "approving scores of pilots for service despite doubts about their fitness." *See* "Aviation Agency Medical Chief Is Asked To Resign," *New York Times,* Nov. 23, 1986, at 28, col.1.

Furthermore, it would be grossly unfair to hoist Northwest on the petard of the FAA recertification orders. Even before it sued to overturn the arbitration award in this case, Northwest petitioned the court of appeals for review of the FAA recertification orders. Northwest argued that the orders and the underlying FAA policies on alcohol abuse are themselves contrary to the Aviation Act and to the FAA's own regulations. In a decision handed down a few months before the decision in this case, the court of appeals recognized that "serious questions" exist about the lawfulness of the FAA's alcoholism policies and about its recertification of Morrison as minimally qualified to fly. *Northwest Airlines, Inc. v. FAA (Morrison)*, 795 F.2d 195, 197 (D.C. Cir. 1986). In an earlier case, the court had expressed similar doubts about the recertification of another alcoholic pilot. *Northwest Airlines, Inc. v. FAA (McClellan)*, 675 F.2d 1303, 1306 (D.C. Cir. 1982). In the

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[1] *See* Northwest Conditional Statement Of Alleged Material Facts As To Which There Is A Genuine Issue And Conditional Request For Discovery, *Northwest Airlines, Inc. v. ALPA,* Civil Action No. 84-3434 (D.D.C.) ("Conditional Statement"), at 14-15; Brief of Petitioner, *Northwest Airlines, Inc. v. FAA*, No. 84-1510 (D.C. Cir.), at 37-43.

FAA (Morrison) case, the court held that Northwest "lacked standing" to challenge Morrison's recertification by the FAA because the district court in *this* case *had overturned* the System Board award. 795 F.2d at 205. A separate panel below now has reversed the district court's decision and reinstated the System Board award, relying on the very FAA certification that the earlier panel had found questionable. Such apparently cavalier treatment of a serious threat to public safety is another reason why this Court should review the case.[2]

Finally, ALPA's attempt to distinguish *Misco* rests on the false premise that the risk of Morrison's relapse in the future was the only basis for his discharge, and was the district court's only basis for denying his reinstatement. That risk is real, since the record establishes that a rule-breaking alcoholic is more likely to revert to rule-breaking behavior if he relapses than is an alcoholic who, unlike Morrison, comes forward to seek treatment before he flies while intoxicated.[3] But risk of relapse was not the sole reason for Northwest's decision to discharge him or the district court's reason for upholding that action. The discharge represented Northwest's attempt to enforce valid, "reasonable and rational" alcohol policies and to deter such gross misconduct *by others*. Pet. App. B at 40a-41a. The district court also recognized that Northwest determined, in the exercise of its duty under the Federal Aviation Act and regulations, that a pilot who engages in such conduct lacks the necessary character and judgment to be entrusted with the lives of thousands of travellers. Pet. App. B at 35a, 46a-47a. The FAA's decision that, as a matter of minimal medical qualification, Morrison's risk of relapse is "only" 10-25% and thus may be acceptable to the agency simply does not speak to these other legitimate public policy concerns.

3. ALPA does not really address the need for this Court to consider whether the court of appeals took an overly narrow view of *W.R. Grace and Co. v. Local 759, International Union*

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[2] The court in the earlier *McClellan* case found that the alcoholic pilot's voluntary retirement had "mooted" Northwest's challenge to the FAA's alcoholism recertification policies.

[3] *See* Northwest Conditional Statement, at 19-20 and Exhs. B & C.

of United Rubber Workers, 461 U.S. 757 (1983). *See* Pet. at 10-18. Rather, ALPA principally argues that the FAA's role in the present case precludes a court from finding that the arbitral award comprises public policy. ALPA concedes that "there is a 'well defined and dominant' public policy based on safety considerations that pilots should not fly when intoxicated." Opp. at 15. ALPA argues, however, that the policy cannot be compromised by the arbitration award because the FAA issued airman and medical certificates to Morrison. *Id.*

The Federal Aviation Act, however, mandates *both* that the FAA set minimum standards for airmen *and* that air carriers act to maintain the *highest degree* of safety—an independent obligation that ALPA conveniently ignores. As we pointed out in the petition (at 16-17), both the arbitrator and the court of appeals here ignored this independent statutory duty imposed on carriers to go beyond the minimum standards promulgated by the FAA when they deem it necessary to achieve the highest possible degree of safety. *See also* ATA/Air Conf. Br. at 3-5, 11-12. Contrary to ALPA's assertion, therefore, the FAA's decision does not foreclose further inquiry into whether the arbitrator's award impermissably frustrates the public policy in allowing airlines to take effective steps to deter and punish drinking and flying.

ALPA again displays its fundamental misunderstanding of the statutory scheme. While the FAA is required to establish minimum standards, the FAA bears no liability for its errors in certifying pilots. *See United States v. Varig Airlines*, 467 U.S. 797 (1984). Thus, its judgments in individual cases as a practical matter do not have to be as cautious as those Congress requires the airlines to make. Carriers are obligated to, and uniformly do, set higher standards than FAA minimums. The carriers' higher responsibility is more than merely theoretical. Unlike the FAA, the carriers actually have in their hands the responsibility for the lives of their passengers, a practical responsibility that is directly enforceable through enormous monetary liability for mistakes. For this reason, carriers cannot rely solely on FAA certification. For the same reason, the arbitrator's award in this case cannot be justified simply on the basis of the FAA recertification.

4. ALPA does not seriously dispute that the question whether the Federal Aviation Act places limits on the authority of Railway Labor Act arbitrators is an important one that has never been resolved by this Court. Nor does ALPA dispute that *World Airways, Inc. v. International Brotherhood of Teamsters,* 578 F.2d 800 (9th Cir. 1978), conflicts with the decision below. *See also Association of Professional Flight Attendants v. American Airlines, Inc.,* 767 F.2d 1331, 1334 (9th Cir. 1985), reaffirming the validity of *World Airways.* Instead, ALPA tries to distinguish *World Airways* on the grounds that (1) the court there suggested it *might* have upheld a "less intrusive remedy", (2) the court found the pilot's judgmental deficiencies "unremediable," and (3) the arbitrator's "remedy, which so far as appears, did not involve the FAA." Opp. at 14.

ALPA's asserted distinctions are flatly wrong. Like *World Airways,* this case involves the carrier's determination that a pilot lacked "unremediable" judgmental deficiencies. Like *World Airways,* this case involves an arbitrator's highly intrusive "remedy"; indeed, it involves the most intrusive "remedy" imaginable—forcing down a carrier's throat a pilot it considers fundamentally unfit. (The arbitrator in *World Airways,* by contrast, simply ordered the airline to promote the pilot from first officer to captain.) Like *World Airways,* the pilot in this case was certified by the FAA as minimally qualified, but did not meet the carrier's higher standards. (We do not understand ALPA's contention that the remedy in *World Airways* "did not involve the FAA." The pilot must have been certified by the FAA as qualified to be pilot-in-command, or there would have been no issue.)

5. ALPA claims that 49 U.S.C. § 1371(k)(3) is inconsistent with the holding of *World Airways* that the Federal Aviation Act places limits on Railway Labor Act arbitrators. Opp. at 12. Section 1371(k)(3) is a part of the Act's economic provisions and simply preserves economic collective bargaining rights in general. "Rates of compensation" and "working conditions"—the only subjects of Section 1371(k)(3)—do not encompass an airline's safety obligations to the travelling public. That issue falls under Section 1421(b), which is part of the Aviation Act's safety provisions and imposes on carriers a

duty to assure the "highest possible degree of safety." Moreover, the Federal Aviation Act's mandate to air carriers "to maintain the highest possible degree of safety" cannot be read to permit an exception if the carrier's *employees* disagree with the carrier's judgment on how best to fulfill the carrier's statutory obligation. As numerous courts have recognized, safety is the *paramount* goal of the Aviation Act.

6. Nevertheless, ALPA asserts that the Aviation Act cannot be read to impose any restrictions on Railway Labor Act arbitrators because "safety is too important a matter to be entrusted to the airlines." Opp. at 12. Having made this perplexing remark, however, ALPA never explains why safety can be entrusted to private labor arbitrators—who are likely to have no technical expertise and who have no legal or practical responsibility to the travelling public.

ALPA then argues that Northwest would "deprive a pilot discharged for a safety violation—even a serious one—of his right under a collective bargaining agreement and the RLA to have a System Board determine whether there is 'just cause' for his discharge." Opp. at 12. In a similar vein, ALPA claims that if "Northwest could discharge pilots for lack of proper character or judgment without having to objectively justify its assessment before a System Board, then RLA and contractual protections would . . . be illusory." Opp. at 18. ALPA has mischaracterized Northwest's position. We agree that the arbitration mechanism is suitable to decide if there is an "objective" justification for a carrier's determination—that is, to determine the facts. Here it is conceded that Morrison flew while drunk. ALPA does not claim that Northwest relied on whim or caprice, or acted without an objective, safety-related foundation, in dismissing Morrison. Under those circumstances, as the district court found, it is inappropriate for an arbitrator in effect to modify the carrier's safety policies by ordering reinstatement of a pilot who actually violated clear, objective, reasonable, safety-related restrictions.

7. Finally, ALPA relies on this Court's decision in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), for its argument that arbitrators may second-guess air carriers' safety

judgments. Opp. at 13. That case, however, arose under the Age Discrimination in Employment Act of 1967, 28 U.S.C. §§ 621-634, and involved Western's "age 60" retirement rule. The Court held that the retirement rule facially violated the Act's express prohibition against mandatory retirement before age 70. The issue involved was whether the retirement rule fit into a narrowly-defined statutory exception—"where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 472 U.S. at 412. The Court held that an air carrier's safety obligations did not require a jury instruction that the jury *must* defer to the carrier's judgment in deciding whether the carrier met its statutory burden to justify its rule as safety-related. Thus, *Criswell* holds only that, if an air carrier's policy violates an express statutory prohibition, a factfinder may inquire whether the otherwise prohibited policy is "reasonably necessary" in the interest of safety. As this Court emphasized, it was "Congress' decision, in adopting the ADEA, to subject such [facially discriminatory] management decisions to a test of objective justification in a court of law." *Id.* at 419.

Here, by contrast, ALPA does not claim—nor could it—that Northwest's rules prohibiting consumption of alcohol within 24 hours of flight duty or its discharge of Morrison for flying a commercial airliner while intoxicated presumptively *violate* any federal statute that by its express terms would require Northwest to justify its policy. Nor is there any doubt that both the rules and their application to Morrison are objectively safety-related. Indeed, the *only* applicable statutory standard is the command of the Federal Aviation Act that Northwest act to maintain the highest degree of safety. Thus, it would pervert *Criswell* to allow an arbitrator to nullify a carrier's efforts to comply with express Congressional policy.[4]

[4] In addition, the Court's willingness to let a jury consider the carrier's assessment of safety issues rested on its view that the safety concerns in *Criswell* were attenuated, since that case involved an air carrier's policies covering flight engineers—not pilots or co-pilots. The Court emphasized that it is the pilot ("captain") and the co-pilot ("first officer") who are "responsible for all phases" of the flight operation, and the flight engineer " 'does not operate the flight controls unless the captain and the first officer become incapacitated,' " 472 U.S. at 403, *quoting Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 114 (1985).

As the Court stated in *Criswell*:

> "The employer cannot be expected to establish the risk of an airline accident 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.' " *Id.* at 419-420, *quoting Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976).

For the same reason, an arbitrator lacks the authority to force an airline either to ignore a real and substantial threat to safety that has already occurred or to assume a risk for the future.

The petition should be granted and the case set for argument *in tandem* with *Misco*.

Respectfully submitted,

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May 1987

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No. 86-1548

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NORTHWEST AIRLINES, INC.,
Petitioner,
v.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS AMICI CURIAE SUPPORTING CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Air Transport Association of America ("ATA") and the Airline Industrial Relations Conference ("Air Conference") respectfully request this Court's leave to file a brief as amici curiae in support of the petition for certiorari filed by Northwest Airlines, Inc. ("Northwest") on March 26, 1987. Northwest has given its consent to the filing of this brief. Respondent Air Line Pilots Association, International, however, has refused to consent, necessitating this motion under Supreme Court Rule 36.1.

ATA and the Air Conference have a substantial interest in the disposition of this petition for certiorari. ATA is a Washington-based trade and service association of twenty-two United States airlines and two Canadian air-

lines. Air Conference is an independent, voluntary association of twenty-one United States scheduled air carriers.* Air Conference was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to represent the member carriers with respect to related legislative, judicial and administrative matters.

This case raises issues of extraordinary concern to all of ATA's and Air Conference's members. Northwest has petitioned the Court to review a District of Columbia Circuit decision holding that the district court did not have discretion to overturn an arbitrator's award reinstating a pilot who was terminated for flying a passenger jet while intoxicated. All member carriers have company alcohol use policies similar to the Northwest policy at issue here. They believe that their ability to enforce those policies is essential in discharging the obligation imposed upon them by the Federal Aviation Act to provide the "highest degree of safety" to the flying public. 49 U.S.C. § 1421(b).

ATA and Air Conference wish to provide this Court an industry-wide perspective on the issues raised by the petition. In the attached brief, ATA and the Air Conference describe the vital need for effective carrier measures that will prevent the slightest degree of danger to the flying public from pilot alcohol use. They describe current carrier alcohol use policies, and the origins of those policies outside the collective bargaining processes upon which the policy of deference to labor arbitration awards is premised. ATA and Air Conference present the industry's view as to why their obligation to preserve air safety should be recognized as a "public policy" justifying the reversal of a labor arbitrator's award under the criteria established by this Court in *W.R. Grace & Company v. Local 759, International Union of Rubber*

* Lists of ATA and Air Conference members appear as an appendix to the attached brief.

Workers, 461 U.S. 757 (1983). ATA and Air Conference believe that the attached brief will illustrate that the public safety issues Northwest petitions this Court to resolve have continuing, vital importance throughout this important sector of the Nation's transportation industry.

For these reasons, ATA and Air Conference respectfully request that the Court grant them leave to file the attached brief as amici curiae. This motion and brief are timely filed.

Respectfully submitted,

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Date: April 25, 1987

QUESTIONS PRESENTED

The Air Transport Association ("ATA") and the Airline Industrial Relations Conference ("Air Conference") submit this brief as amici curiae in support of the petition for certiorari filed by Northwest Air Lines, Inc. ("Northwest") on March 26, 1987.* This case presents two questions whose resolution will vitally affect the ability of ATA's and Air Conference's member air carriers to safeguard the flying public against the dangers created by alcohol use among pilots. Northwest has requested that this Court determine whether a reviewing court may overturn an arbitrator's award reinstating a pilot who had been discharged for flying a passenger jet while intoxicated. Northwest also has asked the Court to decide whether the Federal Aviation Act requirement that a carrier "maintain the highest degree of safety" deprives a Railway Labor Act arbitrator of jurisdiction to overrule a carrier's policy of requiring dismissal as the penalty for flying while intoxicated.

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* A formal statement of the interest of ATA and Air Conference in the disposition of the petition for certiorari appears in their foregoing Motion for Leave to File Brief as Amici Curiae in Support of Petition for Certiorari. Lists of ATA and Air Conference members are attached as an apendix to this brief.

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS AMICI CURIAE SUPPORTING CERTIORARI

STATEMENT

1. *Air Safety and Problems of Employee Alcohol Use*

Since the fares charged by scheduled air carriers were deregulated in 1978, air traffic has increased dramatically. There were 748,549 more aircraft departures in 1985 than in 1977, and 139,698,000 more passengers flown.[1] The scheduling difficulties caused by this in-

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[1] U.S. scheduled airlines had 4,936,519 scheduled departures in 1977 and 5,685,068 departures in 1985. The airlines carried

creased traffic, and the burdens imposed upon airports and air traffic control capacities, are well-publicized subjects of National transportation policy debate. To operate aircraft safely in this environment, pilots must perform at peak mental alertness and physical capacity at all times. The increased flight schedules have caused corresponding increases in airline employment. Each plane flown by an air carrier has a rotating, permanent crew of approximately fifteen pilots and thirty-five flight attendants.

The increase in air traffic coincides with a growing national concern about alcohol and drug abuse among transportation industry employees whose job performance affects passenger safety. The recent Amtrak-Conrail train collision, in which sixteen were killed and 170 were injured, illustrates the grievous consequences of errors in judgment caused by employee use of drugs or alcohol on the job. An alcohol or drug-related catastrophe in the airline industry would take a far greater toll than an accident in other forms of transportation. Domestic air disasters have claimed as many as 275 lives in a single incident.

Carriers involved in such disasters are subject to staggering liabilities. Recent settlements have reached over $800,000.00 per passenger in cases in which there were claims of carrier negligence.[2] Although there has been no commercial air disaster to date among U.S. carriers in which pilot alcohol use has been shown to be a factor,[3] carriers are justifiably concerned that juries might view

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240,326,000 revenue passengers in 1977 and 380,024,000 passengers in 1985. Air Transport 1986, The Annual Report of the U.S. Scheduled Airline Industry ("ATA Report") at 2. Copies of the ATA Report have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

[2] Settlements in the 1982 Air Florida crash at Washington, D.C. National Airport averaged over $800,000.00 per passenger.

[3] Federal Aviation Administration Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 44,432, 44,433 (1986).

their failure to prevent such incidents as gross negligence or recklessness, possibly justifying punitive damages in addition to the already overwhelming compensatory damages. Carriers that fail to conform to Federal Aviation Administration ("FAA") safety standards also can incur steep penalties and/or loss of their certifications.

2. *The Federal Aviation Act Public Safety Mandate*

In formulating all safety policies, including those relating to alcohol use, carriers are guided by the Federal Aviation Act public safety mandate. This mandate imposes upon carriers a duty to maintain public safety independent of the regulatory responsibilities of the FAA. The Aviation Act provides that "the [FAA] Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the *highest possible degree of safety in the public interest. . . .*" 49 U.S.C. § 1421(b) (Supp. 1987) (emphasis added).

Several circuits have recognized that this independent Congressional mandate justifies broad deference to air carrier safety measures. In upholding an age-forty cutoff for second officer applicants, the District of Columbia Circuit rejected an argument that the low probability of safety hazards was insufficient justification for the hardship to rejected individuals, reaffirming that a carrier must avert even the slightest potential danger:

> As an air carrier with a public duty to operate with the highest degree of safety, [a carrier] is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is the essence of [a carrier's] business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), *quoting Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 434 (N.D. Cal.

1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980). *See also Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236, n.30 (5th Cir. 1976) (airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*) (emphasis in original).

The Aviation Act requires the FAA to play the coordinate role of prescribing *minimum* standards for air safety and pilot qualification. 49 U.S.C. § 1421(a) (Supp. 1987). Pursuant to this authorization, the FAA has adopted regulations governing the qualifications for the pilot certifications required under the Aviation Act. FAA regulations establish requirements for training, flight proficiency, airplane performance ratings and related issues. *See generally*, 14 C.F.R., Part 61. The regulations also establish the minimum health qualifications needed for pilots to obtain FAA medical certificates. *See generally id.*, Part 67.

Evaluating pilot competency and judgment is an integral part of a carrier's public safety responsibility. While the FAA evaluates pilots' medical fitness through its medical certification procedures, FAA regulations make carriers solely responsible for "[p]roper evaluation of pilot performance including the detection of . . . personal characteristics that could adversely affect safety." 14 C.F.R. § 121.413(a)(4)(ii). Carriers are extremely selective in choosing, among medically certified persons, those individuals whom they believe best qualified to bear responsibility for the safety of hundreds of lives. There presently are 692,758 persons who hold FAA medical certificates, of whom 115,808 hold first-class certificates, but only 40,153 certified persons were employed by U.S. scheduled air carriers as of January 1, 1986.[4] The Ninth

[4] Statistics on numbers of currently certified persons were obtained by telephone from the FAA Statistics Division on April 23, 1987. Statistics for numbers of certified persons employed by U.S. scheduled carriers appear in ATA Report, *supra* note 1, at 12.

Circuit has recognized that federal law, as embodied in the Aviation Act mandate, entrusts airlines with the responsibility to evaluate whether an individual has the character and judgment to serve as a pilot-in-command. *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800 (9th Cir. 1978).

In accordance with the two-pronged air safety scheme, the FAA's regulations establish minimum standards for pilot alcohol use. The regulations prohibit service as a crew member while under the influence of alcohol, while having .04 percent or more alcohol in the blood by weight, or while subject to a medical deficiency such as alcoholism. 14 C.F.R. §§ 91.11(a)(2) and (4); 61.53. The regulations also prohibit consumption of any amount of alcohol within eight hours before serving as a crew member. *Id.* § 91.11(a)(1). The FAA has explicitly recognized that its eight-hour rule is "a 'rock-bottom' minimum," 35 Fed. Reg. 17,036 (1970), and that "an excellent rule is to allow twenty-four hours between the last drink and the takeoff time." 35 Fed. Reg. 9217 (1970).

3. *Carrier Alcohol Use Rules*

To prevent alcohol-related disasters, many carriers have adopted pilot alcohol use policies that are stricter than the FAA's minimum alcohol abstinence regulations.[5] Half of Air Conference's members have "twelve hour" or

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[5] Most carriers enforce company policies that are stricter than FAA minimum requirements on other issues that could affect in-flight safety. For example, the vast majority of carriers require applicants for pilot positions to have uncorrected 20/20 vision, even though FAA regulations require only 20/100 vision (correctable to 20/20) to obtain a first-class medical certificate. 14 C.F.R. § 67.13(b)(1). Also, most carriers require all three members of a flight crew—pilot, first officer and flight engineer—to have a first-class medical certificate, even though FAA regulations permit a flight engineer to have a second-class medical certificate. *Id.* § 63.31(c).

"twenty-four hour rules" similar to the Northwest rule at issue in this case.[6]

Most carriers have adopted employee assistance programs ("EAPs") to enable employees to seek rehabilitation for alcohol problems. Although the terms and conditions of carriers' EAPs vary, most resemble the Northwest program in requiring that the employee enter the program voluntarily, or through "intervention" procedures involving family members or co-workers, *before* the employee actually violates company rules and endangers public safety. All carriers offer reinstatement, generally with no loss of seniority or pay, to an alcoholic pilot who volunteers for rehabilitation under an EAP *without* violating company alcohol use rules.

All ATA member carriers maintain a strict separation between EAP rehabilitation procedures and the disciplinary measures applied to employees who violate company rules. Carriers deem it critical that they have the discretion to tailor sanctions to the seriousness and circumstances of the offense, and to judge whether the individual demonstrates the judgment and character needed in a person who is entrusted daily with responsibility for hundreds of lives. For serious offenses that reflect upon an employee's judgment and endanger public safety, all carriers deem it essential to protect the flying public by dismissing that individual, without offering him the same opportunity for rehabilitation and continued employment that a nonviolator would receive. No offense poses a more serious peril to human life, or reflects more poorly upon the judgment of the offender, than serving as a member of a flight crew while intoxicated.

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[6] In this case, Morrison violated the FAA "eight hour rule" and the prohibition against serving as a crew member while intoxicated, as well as the Northwest "twenty-four hour rule". This fact illustrates the untenable predicament that the arbitration award creates for carriers. Failure to impose discipline for violation of FAA rules could lead to severe civil liabilities or penalties; imposition of discipline results in an adverse arbitration award.

ATA carriers always have implemented their alcohol abstinence rules unilaterally. No carrier has ever established through collective bargaining its policy concerning the length of the pre-flight period during which it prohibits a pilot from drinking. More important, no carrier has ever negotiated concerning the disciplinary measures to be applied to pilots who violate the alcohol policy, either as a discrete bargaining issue or in connection with the industry standard of requiring "just cause" for pilot termination. The only subject related to alcohol use on which some carriers historically have bargained is the company's agreement to establish an EAP.

Recent grievances, in which arbitrators have found that carriers did not have "just cause" to terminate pilots who flew passenger aircraft while intoxicated, pose a serious threat to carrier efforts to safeguard the flying public. Such decisions will vitiate the deterrent purpose of carrier disciplinary policies by suggesting to alcoholic pilots that they need not immediately volunteer for rehabilitation, since even the most flagrant violations of alcohol use rules may not result in termination.

In the instant case, the System Board convened pursuant to the Railway Labor Act ordered reinstatement of pilot Morrison, who had jeopardized public safety by serving as first officer of a flight while intoxicated, on grounds that Morrison's actions were non-volitional due to his alcoholism. Grievance of Larry Morrison, Northwest Airlines, Inc. Pilots' System Board of Adjustment, Grievance 405-82 (Oct. 29, 1984), attached to Petitioner's Brief, Appendix at 71a. In another recent grievance, an arbitrator ordered Delta Airlines to reinstate pilot William Day, who served as a pilot-in-command while legally intoxicated. Grievance of William D. Day, Delta Airlines Pilots' System Board of Adjustment, ALPA Case No. 1-85 (Jan. 31, 1987), *complaint to vacate award pending sub nom. Delta Airlines, Inc. v. Air Line Pilots Association*, C.A. No. C87-239A (N.D. Ga., filed Feb. 12, 1987).

4. *FAA Rulemaking Proceedings on Alcohol and Drug Use*

Although the FAA has begun a rulemaking proceeding addressing drug and alcohol abuse in the aviation industry, the rules it may adopt cannot resolve the issues raised by this case. The FAA has indicated no intention to supplant individual carrier alcohol use rules, or carrier judgment on disciplinary measures to be applied to pilots who violate those rules. In an Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 44,432 (1986) (to be codified at 14 C.F.R., Part 91) (proposed Dec. 9, 1986), the FAA stated that any new alcohol and drug abuse rules could include mandatory alcohol testing, including both random and scheduled testing and testing upon "reasonable suspicion," and extension of drug and alcohol rules to additional job categories such as mechanics. *Id.* at 44,434. The FAA also may require carriers to establish EAPs that would include "(1) prevention through education and training, (2) detection through training of employees and mandatory random testing and (3) rehabilitation." *Id.* Each element "would be required to conform with minimum FAA standards." *Id.* None of the specific questions on which the agency seeks comment concerns the discipline to be applied to individuals who violate present or proposed rules.[7] *See id.* at 44,434-36.

ATA's comments underscore the need to preserve carrier independence to adopt alcohol and drug use standards that exceed FAA minimums. Comments of the Air Transport Association of America to the FAA, Docket No. 25148 ("ATA Comments").[8] ATA proposes that the

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[7] In its questions concerning "minimum" EAPs, the FAA asks, "How far should a certificate holder go in terms of employee rehabilitation, *i.e.* how many 'relapses' should the employee be allowed?" 51 Fed. Reg. at 44,435. This question does not touch upon discipline for rule violators, since an alcoholic need not violate alcohol use rules in suffering a relapse of his medical condition.

[8] Copies of the ATA Comments to the FAA have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

FAA require carriers to adopt programs incorporating certain mandatory elements, including applicant screening, employee testing after accidents and "safety incidents" and upon "reasonable suspicion." ATA Comments at 3. ATA emphasizes the need to retain carriers' current practice of excluding rule violators from eligibility for EAP rehabilitation, *id.* at 3, 11-13, proposing that the FAA program include

> . . . one opportunity for rehabilitation for employees who voluntary admit to a drug or alcohol problem and are not in a job jeopardy status. Employees whose drug or alcohol use is discovered by testing, and *employees who have violated other company rules and who are in a job jeopardy status would not be entitled to participate in a rehabilitation program.*

Id. at 3 (emphasis added). ATA has advised the agency that any offer of additional opportunities for rehabilitation "should be left to the discretion of the carrier on a case-by-case basis." *Id.* at 12. ATA also emphasizes the need to preserve carriers' current practice of enforcing alcohol use rules, such as "twenty-four hour rules" that are more stringent than FAA's minimum "eight hour rule." *Id.* at 8.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IMPROPERLY RESTRICTED THE "PUBLIC POLICY" EXCEPTION THAT THIS COURT ESTABLISHED IN W. R. GRACE

The court of appeals' holding that the district court lacked discretion to overturn the arbitrator's award is based upon an insupportably narrow reading of the "public policy exception" articulated by this Court in *W. R. Grace & Company v. Local 759, International Union of Rubber Workers*, 461 U.S. 757 (1983). In *W. R. Grace*, the Court acknowledged that a court may refuse to enforce an arbitration award issued under a collective bar-

gaining agreement "if the contract as interpreted by [the arbitrator] violates some explicit public policy . . ." *Id.* at 766. The court stated

> Such a public policy, however, must be well-defined and dominant, and is to be ascertained '*by reference to* the laws and legal precedents and not from general considerations of supposed public interests.' *Muschany v. United States*, 324 U.S. 49, 66 (1945)

Id. at 766. (emphasis added)

The Court suggested several factors that might render an award contrary to public policy. These considerations include not only the factor proposed by the court of appeals—whether the award requires a party to violate a statute, regulation or court order—but also whether the award creates an incentive for a party or others to violate a clearly defined public policy, *id.* at 769, and whether other important policies would be adversely affected by the court's action. *Id.* at 770-71.

The petition in this case adequately demonstrates the conflict among the circuits regarding the proper scope of the public policy exception articulated in *W.R. Grace*, and amici will not belabor the point. For the reasons stated in the petition, this case should be heard together with *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, —— U.S. ——, 107 S.Ct. 871 (January 12, 1987) (No. 86-651), as the vehicle for resolving that circuit conflict. More important from ATA's and Air Conference's perspective, however, is the effect that the D.C. Circuit's overly restrictive reading of *W.R. Grace* will have on carrier's ability to enforce alcohol use rules.

The D.C. Circuit has ignored the Court's discussion of other considerations relevant to the "public policy" exception, and restricted the exception to cases in which the award contravenes positive law. The court below has rewritten the statement that public policy must be "as-

certained *by reference to* laws and legal precedents," somehow concluding that this Court must have "meant to say only that an arbitration award may not be enforced *if it transgresses* "well defined' and 'dominant' laws and legal precedents." *Northwest Airlines, Inc. v. Air Line Pilots Association, International*, 808 F.2d 72, 83 (D.C.Cir. 1987), *rev'g*, 633 F.Supp. 779 (D.D.C. 1985) (emphasis added). The court justifies its restrictive approach with the statement that the public policy exception must be extremely narrow, in keeping with the policy of deference to labor arbitration awards. *Id.*

Even if the Aviation Act safety mandate is not viewed as positive law that would be violated by enforcement of the award, the mandate certainly embodies the "well-defined and dominant policy" of maintaining air safety, which would be disserved by enforcement of the award. Because of its misunderstanding of the nature of the public safety mandate, the court of appeals fails to acknowledge the mandate as a countervailing statutory policy that must be balanced against the policy of enforcing labor arbitration decisions.[9] Instead, it incorrectly reasons that overturning the award would undermine what it views as the exclusive role of the FAA in regulating air safety:

> . . . the Board's award was conditioned upon a finding by the FAA—*i.e.*, the authorized public agency responsible for licensing pilots—that Morrison was fit and qualified to fly. *To suggest that the Board's award violates public policy is to contend that the FAA was derelict in its responsibilities in considering Morrison for recertification.* Obviously, it would be patently absurd for us, under the guise of "public policy," to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforce-

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[9] The district court correctly recognized the independent status of the FAA safety mandate. 633 F. Supp. at 788-96.

> ment of the public policy here at issue. Unless the FAA's decision to recertify Morrison is overturned pursuant to some lawful administrative or judicial proceeding designed to consider such matters, we must assume the legitimacy of Morrison's recertification. It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty. At its core, Northwest's argument seeks just such a result . . .

808 F.2d at 83. (emphasis added)

The court of appeals thus fails to recognize that its ruling thwarts carriers' ability to implement their *independent* safety mandate in their selection of trustworthy pilots. The court of appeals fundamentally misconstrues the agency's medical certification process by failing to recognize that an FAA medical certificate only represents that pilot has met minimal *medical* qualifications to fly aircraft. It is the carrier's responsibility to determine which of these medically certified pilots also possess the necessary attributes of judgment, temperament, and experience to transport their passengers. The small percentage of eligible, certified persons actually employed by carriers illustrates that carriers exercise great discretion in selecting pilots.

Moreover, the court of appeals disregards another public policy consideration recognized by this Court—the serious possibility that the award will create an incentive for other alcoholic pilots to violate public policy, as embodied in explicit FAA regulations as well as company rules, by flying while intoxicated. Morrison committed the most egregious possible breach of public safety, and yet has received reinstatement on terms that differ little from those he would have obtained if he had volunteered for rehabilitation *before* he endangered dozens of lives.

If enforced, the award will exacerbate alcoholic pilots' tendency to postpone the difficult personal and profes-

sional adjustments associated with entering rehabilitation. Pilots are more likely to delay acknowledging their drinking problems until after they are discharged for flying while intoxicated, knowing that they probably will be reinstated after completing a rehabilitation program and obtaining FAA recertification. If pilots thus believe that they will not be discharged for even the most serious breach of company rules and FAA regulations, it will be impossible for carriers to maintain the integrity of preflight alcohol use rules that are intended to ensure the highest possible degree of public safety. Carriers cannot counteract the threat to their safety measures by adopting stricter sanctions, including discharge, for lesser offenses, since these sanctions probably would be even more vulnerable to challenge in arbitration than discharges for flying while drunk.

Finally, even if the court of appeals were correct in ruling that violation of positive law is the only basis upon which courts may find that an arbitration award violates public policy, the award at issue does violate positive law. The Aviation Act mandate that carriers maintain "the highest possible degree of safety" is a federal statute, not a "general consideration of supposed public interests". Because the court incorrectly views a carrier's safety obligations as subsumed under FAA air safety regulations and actions taken thereunder, such as medical recertification of alcoholics, it does not take into account the carriers' universal practice of adopting individual safety rules that *exceed* FAA minimums, pursuant to their statutory duty. If carriers are unable to enforce these stricter standards through correspondingly stringent disciplinary measures, without having their judgment questioned because of the existence of lower FAA standards, carriers' ability to carry out their statutory mandate will be severely compromised.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE FEDERAL AVIATION ACT SAFETY MANDATE RESTRICTS THE JURISDICTION OF RAILWAY LABOR ACT ARBITRATORS, TO ELIMINATE CONTINUING UNCERTAINTIES ABOUT THE ENFORCEABILITY OF CARRIER SAFETY MEASURES

As Petitioner has indicated, the District of Columbia Circuit's decision conflicts directly with the Ninth Circuit's decision in *World Airways, Inc. v. International Brotherhood of Teamsters, supra.* In *World Airways,* the court held that the Aviation Act public safety mandate imposes substantive restrictions upon the jurisdiction of Railway Labor Act arbitrators. The Ninth Circuit concluded that a system board had overstepped its jurisdiction by ordering retraining for a pilot who had been demoted for numerous errors of judgment, on the ground that determining competency and fitness of a pilot is statutorily entrusted to the airline as part of its nondelegable duty to maintain the highest standards of public safety. The District of Columbia Circuit, however, looked solely to the terms of the Northwest/ALPA collective bargaining agreement to determine whether the parties themselves had agreed to exclude safety issues from the scope of contractual grievance arbitration:

> There is *nothing* in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review. Indeed, quite the contrary is true because *all* disciplinary actions taken pursuant to Section 19 are made subject to Board review under Section 21. There is no conceivable way to construe the parties' agreement as removing from the Board's jurisdiction disciplinary actions related to alleged breaches of the twenty-four hour rule.

808 F.2d at 81-82. (emphasis in original). The court states, ". . . it is not the role of the courts to alter the

labor-management balance struck in the collective bargaining agreement." *Id.* at 83.

As the foregoing statements illustrate, the decision is based upon a mistaken understanding of historical patterns of bargaining concerning public safety issues covered by the FAA mandate. Safety measures like the twenty-four hour rule have never been a subject of a collective bargaining agreement between ALPA and any carrier. Rather, each carrier has always implemented its safety rules unilaterally. It has long been the carriers' understanding that grievance arbitrations concerning safety issues are confined to factual determinations of whether the grievant committed the infraction of which he was accused, not the validity of the carrier's safety policies or the *de facto* modification of those policies through alteration of the specified sanctions.

Absent resolution of the conflict among circuits, carriers will face continuing uncertainty about the enforceability of the disciplinary measures they believe necessary to implement the Aviation Act public safety mandate. Without the Court's guidance as to whether an arbitrator has jurisdiction—other than as a fact-finder—to overrule a carrier's decision to discharge a pilot who flies while intoxicated, carriers will remain uncertain as to how they may prevent the unacceptable safety risk of allowing that pilot to continue flying. In this period of expanding commercial airline traffic, such uncertainty in itself poses a hazard to public safety.

CONCLUSION

For the foregoing reasons, ATA and Air Conference respectfully submit that this Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Aloha Airlines
American Airlines
Braniff
Continental Airlines
Delta Air Lines
Eastern Air Lines
Evergreen International Airlines
Federal Express
The Flying Tiger Line
Hawaiian Airlines
Midway Airlines
Northwest Airlines
Pan American World Airways
Piedmont Airlines
PSA-Pacific Southwest Airlines
TranStar Airlines
Trans World Airlines
United Airlines
United Parcel Service
USAir

Associate Members

Air Canada
Canadian Pacific Air Lines

AIR CONFERENCE MEMBERS

Airborne Express
AirCal
Alaska Airlines
Aloha Airlines
America West Airlines
American Airlines
Braniff Airways
Continental Airlines
Eastern Airlines
The Flying Tiger Line
Midway Airlines
Northwest Airlines
Pacific Southwest Airlines
Pan American World Airways
Piedmont Airlines
Reeve Aleutian Airways
Tower Air
Trans World Airlines
United Airlines
USAir
World Airways

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IN THE

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OCTOBER TERM, 1987

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Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

Pursuant to Supreme Court Rule 22.6, Respondent Air Line Pilots Association, International ("ALPA") submits this supplemental brief in opposition to the petition for certiorari filed by Northwest Airlines, Inc. Since ALPA's last filing, the Court decided *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 108 S. Ct. 364 (1987), and, more recently, dismissed as improvidently granted the writ of certiorari in *U.S. Postal Service v. Nat'l Assn. of Letter Carriers,* 56 U.S.L.W. 4362 (U.S. April 27, 1988).

1. In *Misco* the Court stated (108 S. Ct. at 374):

> Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed dis-

> cipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.[11]
>
> [11] The issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases, and it was a matter for the arbitrator in the first instance to decide whether Cooper's alleged use of drugs on the job would actually pose a danger. That is not a problem here, for the arbitrator recognized that being under the influence of marijuana while operating slitter-rewinder machinery was indeed dangerous, and no one disputed this point.

In the instant case, the parties stipulated in the System Board proceeding that First Officer Larry Morrison performed his duties as a commerical pilot while under the influence of alcohol (Pet. App. 54a), and no one disputed the danger of such misconduct. Nonetheless, the Board imposed discipline short of discharge because it found as a factual matter that he could be trusted to return to flying without endangering air safety. Specifically, the Board determined that Mr. Morrison was an alcoholic who had successfully rehabilitated himself and remained abstinent. (Pet. App. 72a) Even then, the Board conditioned Mr. Morrison's reinstatement on his obtaining an unrestricted first class medical certificate from the Federal Aviation Administration, which requires " 'established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol, for not less than the preceding 2 years.' " (Pet App. 73a) In these circumstances, as *Misco* makes clear, the court of appeals correctly concluded that "there is no [public policy] basis upon which to set aside the Board's award in this case." (Pet. App. 13a)

2. The Court noted in *Misco* (108 S. Ct. at 374-75, n. 12) that "[w]e need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law."[1] However, as with *U.S. Postal Service v. Natl. Assn. of Letter Carriers, supra,* this case is not a suitable vehicle for addressing the issue deliberately left unaddressed in *Misco.* Our case is atypical in that, as the court of appeals pointed out, "the Board's award was conditioned upon a finding by the FAA—*i.e.*, the authorized public agency responsible for licensing pilots—that Morrison was fit and qualified to fly." (Pet. App. 13a) Hence, ". . .it would be patently absurd. . ., under the guise of 'public policy,' to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue." *Ibid.*

CONCLUSION

The decision in *Misco* and the dismissal of the writ of certiorari in *Letter Carriers* provide a sound additional basis for denying the petition for certiorari here.

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[1] The Union's position in *Misco* is likewise the view of the District of Columbia Circuit in this case (Pet. App. 12a-13a) and in others. *E.g., American Postal Workers Union v. United States Postal Service,* 789 F.2d 1, 8 (D.C. Cir. 1986). Indeed, Judge Harry T. Edwards, the author of the court of appeals' decisions in this case and in *American Postal Workers,* has also authored a post-*Misco* law review article forcefully and persuasively supporting that view. Edwards, *Judicial Review Of Labor Arbitration Awards: The Clash Between The Public Policy Exception And The Duty To Bargain,* 64 Chi.-Kent L. Rev. 3 (1988).

Respectfully submitted

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SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION

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SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION

Petitioner Northwest Airlines, Inc., submits this supplemental brief in support of its petition for a writ of certiorari and in response to the supplemental opposition filed on May 6, 1988, by respondent Air Line Pilots Association ("ALPA").

1. ALPA recognizes (Supp. Opp. at 3) that the Court in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 108 S. Ct. 364 (1987), expressly declined to rule on the very issue presented in this case: whether "a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." *Misco*,

108 S. Ct. at 374-75 n.12. The continuing conflict among the courts of appeals both before and since the ruling in *Misco* plainly illustrates that the need for guidance on the pubilc policy exception is greater than ever.

In *Misco*, this Court noted that the Ninth and the District of Columbia Circuits take an extremely narrow view of the judicial power to decline enforcement of arbitral awards on public policy grounds, while the First and Seventh Circuits take a less restrictive approach. *Misco*, 108 S. Ct. at 369 n.7.

In the wake of *Misco*, the lower courts have expressed uncertainty about the scope of the "public policy" exception. In *United States Postal Service v. National Ass'n of Letter Carriers, AFL-CIO*, 839 F.2d 146, 150 (3rd Cir. 1988), for example, although the court of appeals upheld an arbitrator's reinstatement of a postal employee who shot at his supervisor's car, the court expressly declined to reach the question "how narrow the limits of the scope of review of a collective-bargaining arbitration decision are," despite urgings from both parties. *See also S.D. Warren Co. v. United Paperworkers' Int'l Union*, (1st Cir. April 21, 1988, No. 86-1405 LEXIS) (court avoided reaching the public policy exception by instead ruling on whether the arbitrator had exceeded her authority).

Some courts have tried to resolve the question and have reached conclusions at odds with those of other circuits. In *Stead Motors of Walnut Creek v. Automobile Machinists Lodge No. 1173, Int'l Ass'n of Machinists and Aerospace Workers*, 127 L.R.R.M. 3213 (9th Cir. Mar. 30, 1988), for instance, the court of appeals affirmed a decision to overturn an arbitration award to reinstate an auto mechanic who had recklessly failed to tighten lug bolts on a customer's automobile, thereby endangering the car's driver and passengers. Both the district court and the court of appeals found that the arbitrator's decision violated a well-defined, dominant public policy of the

State of California.[1] Although this Court previously identified the Ninth Circuit as having adopted the more restrictive view toward the public policy exception, it is hard to imagine such a result if a restrictive view, as adopted by the District of Columbia Circuit in this case, was in fact applied in *Stead Motors*. Thus, the Ninth Circuit case law may be internally inconsistent, even after *Misco*.

In a post-*Misco* case of remarkable similarity to this case, the Eighth Circuit affirmed a decision to vacate an arbitrator's reinstatement of a nuclear power plant employee who had deliberately violated a federally-mandated safety regulation and company safety policy. *Iowa Electric Light and Power Co. v. Local Union 204, Int'l Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987). The company had discharged the employee after learning that he had intentionally flouted safety regulations at a nuclear power plant. Expressly rejecting the District of Columbia Circuit's view, the court of appeals held that it was "not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds." *Iowa Electric, supra*, 834 F.2d at 1427 n.3. The Eighth Circuit placed great emphasis on the special need for nuclear plant operations to protect the safety of the public and on the federal statute mandating such a safety priority. *See also Hyde Park Community Hospital v. Allied Services Division*, (N.D. Ill. Dec. 23, 1987, No. 87 C 1315 LEXIS) (reversing an arbitration award that conditioned reinstatement on the denial of union office for one year, holding that the award contravened the public policy expressed by an act of Congress governing union democracy).

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[1] The court found the public policy in California's Vehicle Code, which made unlawful the operation of any vehicle in an unsafe condition, and in legislation associated with the California Bureau of Automotive Repair.

Cases like *Iowa Electric*, *Stead Motors* and *Hyde Park*—as well as *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 736 F.2d 822 (1st Cir. 1984)—are fundamentally at odds with the unique, highly restrictive approach of the District of Columbia Circuit expressed in the opinion below. There is a need for this Court to resolve the question.

2. ALPA claims, however, that this case is inappropriate for certiorari because the FAA granted First Officer Larry Morrison a medical certificate even after he flew while intoxicated. Unlike typical discharge arbitrations involving workplace safety, however, the "party" who will bear the ultimate consequences of the arbitral decisions in this case is the travelling public. Moreover, unlike the typical discharge case, the employer in this case was acting pursuant to an express mandate. The Federal Aviation Act imposes a specific obligation on each air carrier—independent of any obligations imposed on the FAA—to maintain the highest degree of air safety. 49 U.S.C. § 1302(a)(2). (*See* Pet. at 17) The arbitral award in this case interferes with and undermines Northwest's ability to fulfill that obligation and, therefore, violates the explicit public policy embodied in the Act.[2]

3. ALPA now asserts the arbitrator "found as a factual matter that [Morrison] could be trusted to return to flying without endangering air safety." (Supp. Opp. at 2) There is, however, no such explicit finding in the arbitrator's opinion, which simply states:

> "Inasmuch as the Federal Air Surgeon has the statutory authority to make such determinations [recovery from alcoholism] and must do so with the highest regard for air safety, the Chairman is of

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[2] Moreover, as we argue in the Petition, the Federal Aviation Act's mandate deprives the arbitrator of authority to overrule Northwest's safety policies. (*See* Pet. at 19-22)

> the opinion that the Award herein is consistent with public policy and within the Board's authority to make." (Pet. App. at 75a)

The arbitrator, as well as the court below, ignored the statutory obligation that the Federal Aviation Act imposes on air carriers. Moreover, the FAA regulations that the court of appeals and the arbitrator relied upon are *minimum* standards for *medical* certification of airmen.[3] *See* 49 U.S.C. § 1421. This case, however, is not a medical discharge case. The mere fact that the FAA reissued a medical certificate to Morrison should not obscure the undisputed facts in this case:

- Morrison violated a specific FAA regulation prohibiting flight crewmembers from flying "within 8 hours after the consumption of any alcoholic beverage." 14 C.F.R. § 91.11.
- Morrison violated a specific FAA regulation prohibiting flight crewmembers from flying "while under the influence of alcohol." 14 C.F.R. § 91.11.
- Morrison violated a specific FAA regulation prohibiting flying while subject to "a known medical deficiency." 14 C.F.R. § 61.53.
- Morrison violated Northwest's rule prohibiting consumption of alcohol within 24 hours of a flight. (Pet. App. at 54a)

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[3] ALPA has elsewere also admitted that the FAA sets only minimum standards, and in fact ALPA has defined an acceptable margin of safety as being "the difference between the minimum standards set by FAA and the higher, self-imposed standards of the airlines achieved through the cooperative efforts of pilots and management." O'Brien, *Deregulation and Safety: ALPA's Perspective*, AIRLINE PILOT, Aug. 1987, at 16. In that same article, ALPA recognized a carrier's responsibility to comply with the federal aviation regulations "and to provide the highest possible degree of aviation safety." *Id.* at 19. Furthermore, ALPA does not challenge a recent finding that FAA inspector staffing is inadequate "to accommodate overall responsiveness and responsible certificate administration." *Id.* at 20. (*See also* Reply at 3)

- Morrison admitted that "he probably had violated the 24-hour rule before." (Pet. App. at 53a)

Northwest discharged Morrison because his violations of federal law and company rules endangered the lives of 79 people aboard a Northwest passenger jet on August 1, 1982, and demonstrated that Morrison does not possess the judgment and sense of responsibility Northwest requires of its pilots. The FAA's medical certification procedures do not purport to determine the overall fitness of a pilot. That determination is vested by law exclusively in the air carrier. *See* 14 C.F.R. § 121.413(a)(4)(ii).[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] In *Iowa Electric, supra*, the court distinguished the instant case by noting in passing that the arbitrator's award in Morrison's case "was based on the pilot's recertification" by the FAA. 834 F.2d at 1429. (In *Iowa Electric*, the Nuclear Regulatory Commission had approved the employee's termination.) The court of appeals, however, failed to recognize that FAA standards are *minimum* requirements, and that airlines have an obligation at times to go beyond those minimum standards to ensure they meet their independent statutory obligation of maintaining the highest degree of safety.